Supreme Court, U. S.
FILED
JUN 26 1980
MICHAEL RODAK, JR., CLERK

No. 79-870

In the
Supreme Court of the United States

UNITED STATES RAILROAD RETIREMENT BOARD,

Appellant,

vs.

GERHARD H. FRITZ, on his own behalf and on behalf of all those similarly situated,

Appellee.

On Appeal From The United States District Court
For The Southern District Of Indiana.

BRIEF FOR THE APPELLEE

DANIEL P. BYRON
PHILLIP A. TERRY
McHALE, COOK & WELCH, P.C.
1122 Chamber of Commerce Building
Indianapolis, Indiana 46204

GILL DEFORD
National Senior Citizens Law Center
1636 West 8th Street
Los Angeles, California 90017
Attorneys for Gerhard H. Fritz, on his own behalf and on behalf of all those similarly situated, Appellee.

The Scheffer Press, Inc.—(312) 263-6850

INDEX

PAGE

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

I. HISTORICAL DEVELOPMENT OF RAILROAD RETIREMENT 2

II. THE SPECIFIC DEVELOPMENT OF THE 1974 RAILROAD RETIREMENT ACT 4

SUMMARY OF ARGUMENT 18

ARGUMENT 22

I. THE ELIMINATION OF VESTED BENEFITS TO THE PLAINTIFF CLASS REPRESENTS INVIDIOUS DISCRIMINATION IN VIOLATION OF THE GUARANTEES OF EQUAL PROTECTION 22

A. *Under the rational basis test, the classificatory scheme must rationally further a legitimate governmental interest.* 22

B. *The classificatory scheme explicitly established a class whose members, alone among beneficiaries vested on the Act's effective date, are denied dual benefits.* 24

C. *The expressed purpose of the Commission and of Congress, to protect all vested beneficiaries, was subverted by the JLMC, whose goal was different.* 28

D. *The disenfranchisement of the Plaintiff Class effected by the statutory scheme does not rationally further a legitimate governmental purpose.* 40

E. *The Government should not be allowed to avoid constitutional guarantees of equal protection on the NRLC's wrongful assertion that the Plaintiff Class "deserted" the industry or was "disloyal."* 51

PAGE

F. *The JLMC caused Congress unwittingly to single out the Plaintiff Class, which had no opportunity to speak up.* 53

G. *A similar previous deprivation of full dual benefits was found by Congress to be invidiously discriminating.* 55

H. *The divestiture of the Class did not come about through mere imperfect line-drawing between classes.* 57

I. *This discrimination does not represent a gradual approach to remedying the problem.* 59

J. *There are no equitable considerations which favor the singling out of the Plaintiff Class for divestiture.* 59

K. *The reliance of the Plaintiff Class on the dual benefits emphasizes the 1974 Act's arbitrariness.* 61

II. THE CLASSIFICATION IS ALSO UNCONSTITUTIONAL BECAUSE IT IS THE PRODUCT OF A CONGRESSIONALLY SANCTIONED BREACH OF A FIDUCIARY DUTY 63

III. THE GOVERNMENT HAS RAISED AN INAPPROPRIATE ISSUE AS TO RELIEF 68

IV. CONCLUSION 71

CITATIONS

CASES:

Allied Chemical & Alkali Workers v. *Pittsburgh Plate Glass Company*, 404 U.S. 157 (1971) 63

Alton R. Co. v. *Railroad Retirement Board*, 16 F. Supp. 955 (D.D.C. 1936) 3

Baxstrom v. *Herold*, 383 U.S. 107 (1966) 43

Board of Regents of State Colleges v. *Roth*, 408 U.S. 564 (1972) 61

PAGE

Califano v. *Aznavorian*, 439 U.S. 170 (1978) 23, 28, 57

Califano v. *Boles*, 443 U.S. 282 (1979) 24, 28

Califano v. *Goldfarb*, 430 U.S. 199 (1977) 23

Califano v. *Jobst*, 434 U.S. 47 (1977) 24, 43

Califano v. *Westcott*, 443 U.S. 76 (1979) 68, 69, 70

Crowell v. *Palmer*, 134 Conn. 502, 58 A.2d 729 (1948) 65

Dandridge v. *Williams*, 397 U.S. 471 (1970) 50, 57

Delaware Tribal Business Committee v. *Weeks*, 430 U.S. 73 (1977) 40, 58

Geduldig v. *Aiello*, 417 U.S. 484 (1974) 59

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 61

Hargrove v. *Brotherhood of Locomotive Engineers*, 116 F. Supp. 3 (D.D.C. 1953) 64, 65

Hisquierdo v. *Hisquierdo*, 439 U.S. 572 (1979) 3, 23

Hurd v. *Hutnik*, 419 F. Supp. 630 (D.N.J. 1976) 64

Johnson v. *Robinson*, 415 U.S. 361 (1974) 23

Knauss v. *Gorman*, 583 F.2d 82 (3rd Cir. 1978) 54

Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307 (1976) 61

Mathews v. *Lucas*, 427 U.S. 495 (1976) 23

Medora v. *Colautti*, 602 F.2d 1149 (3d Cir. 1979) 42

Memorial Hospital v. *Maricopa County*, 415 U.S. 250 (1974) 42

Nachman v. *Pension Benefit Guaranty Corporation*, ... U.S. ....., 48 U.S.L.W. 4524 (May 13, 1980) 18, 25

Nedd v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977) 64

Railroad Retirement Board v. *Alton Railroad Company*, 295 U.S. 330 (1935) 3, 48, 52

PAGE

Richardson v. *Belcher*, 404 U.S. 78 (1971) 22, 43

Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 43

Schneider v. *Rusk*, 377 U.S. 163 (1964) 22

Scott v. *Railroad Retirement Board*, 227 F.2d 684 (7th Cir. 1955) 57

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 42

Silbowitz v. *Secretary of HEW*, 397 F. Supp. 862 (S.D. Fla. 1975), aff'd 430 U.S. 924 (1977) 42, 43

Steele v. *Louisville & Nashville Railroad Company*, 323 U.S. 192 (1944) 64, 67, 68

Trailmobile Company v. *Whirls*, 331 U.S. 40 (1947) 68, 69

U.S. Department of Agriculture v. *Moreno*, 413 U.S. 528 (1973) 53

Weinberger v. *Salfi*, 422 U.S. 749 (1975) 28, 57

Weinberger v. *Wiesenfeld*, 420 U.S. 636 (1975) 23

Winer v. *Edison Brothers Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979) 17

Winpisinger v. *Aurora Corporation of Illinois*, 456 F. Supp. 559 (N.D. Ohio 1978) 53, 54

CONSTITUTION AND STATUTES:

Employee Investment Retirement Security Act, 29 U.S.C. §§1001 et seq., 29 U.S.C. §1053 17

Railroad Retirement Act of 1934, 48 Stat. 1283 2

Railroad Retirement Act of 1935, 49 Stat. 967 3

Railroad Retirement Act of 1937, 50 Stat. 307 ..... 2, 3

Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. §§231 *et seq.* 2

45 U.S.C. §231a(a)(1)(ii) 10

45 U.S.C. §231a(b)(1)(i) 10

45 U.S.C. §231a(c)(1)(i)(B) 10

PAGE

45 U.S.C. §231b(h) 1, 11
45 U.S.C. §231b(h)(1) 24
45 U.S.C. §231b(h)(2)(A) 46
45 U.S.C. §231c(g) 10
45 U.S.C. §231s 70

Social Security Act, 42 U.S.C. §§401 *et seq.*, 42 U.S.C. §414(a) 26

Pub. L. No. 82-234 3

Pub. L. No. 83-398 4

Pub. L. No. 91-377, 84 Stat. 791 6
§7(a)(1), 84 Stat. 791 7

Pub. L. No. 93-69, 87 Stat. 162 8
§107(a), 87 Stat. 162 8
§107(c)(1), 87 Stat. 162 8
§107(c)(2), 87 Stat. 162 65
§108, 87 Stat. 162 8

United States Constitution, Fifth Amendment 1

MISCELLANEOUS

Report of the Commission on Railroad Retirement, *The Railroad Retirement System: Its Coming Crisis*, H.R. Doc. No. 92-350, 92d Cong., 2d Sess. (1972) 2

Hearings on S. 3231 Before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. (1934) (Testimony of Herman L. Ekern) 2

Report of House Committee on Interstate and Foreign Commerce, H.R. Doc. No. 758, 83d Cong., 1st Sess. (1953) 4, 5, 6

S. Rep. No. 93-1163, 93d Cong., 2d Sess. (1974) 9, 12, 29

120 Cong. Rec. 18391 (1974) 10, 14

Hearings on H.R. 15301 Before the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess. (1974) 27, 32, 35, 57, 62

PAGE

120 Cong. Rec. H10546 (1974) 14, 30

Report of House Committee on Interstate and Foreign Commerce, *Railroad Retirement Act Restructuring,* H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. (1974) 29, 31, 48

Hearings Before the Senate Committee on Labor and Public Welfare, *Restructuring of the Railroad Retirement System,* 93d Cong., 2d Sess. (1974) 33

123 Cong. Rec. S1448 (1977) 42, 51, 55

Cox, The Duty of Fair Representation, 2 VILL. L. REV. 151 (1957) 67

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-870

UNITED STATES RAILROAD RETIREMENT BOARD,

Appellant,

vs.

GERHARD H. FRITZ, on his own behalf and on behalf of all those similarly situated,

Appellee.

On Appeal From The United States District Court For The Southern District Of Indiana.

BRIEF FOR THE APPELLEE

QUESTION PRESENTED

Whether the District Court erred in determining that Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. §231b(h), violates the equal protection guarantees of the Fifth Amendment because it irrationally distinguishes between classes of similarly situated vested annuitants by depriving the members of one such class of their "dual benefits" solely because of the timing of their accrued railroad service.

STATEMENT OF THE CASE

The Statement of the Case of the Appellant, United States Railroad Retirement Board ("Government") is incomplete and somewhat misleading. The Plaintiff Class, therefore, provides this Court with the following Statement of the Case which is based upon the undisputed record made below:

I. HISTORICAL DEVELOPMENT OF RAILROAD RETIREMENT

The Railroad Retirement Act of 1937, 50 Stat. 307, the predecessor to the present statute, the Railroad Retirement Act of 1974, 45 U.S.C. §231 *et seq.* (hereinafter referred to as the "Act"), was established to remedy a number of deficiencies in the private pension plans of the railroad companies. Among these was "a feeling that company pensions were merely 'charity,' guaranteed no rights, and afforded no real degree of protection . . . ." COMMISSION ON RAILROAD RETIREMENT, THE RAILROAD RETIREMENT SYSTEM: ITS COMING CRISIS, H.R. Doc. No. 92-350, 92d Cong., 2d Sess. (1972), (hereinafter, "COMMISSION REPORT") Vol. II, Staff Papers, 13. A primary goal of the first effort at a retirement statute, the Railroad Retirement Act of 1934, 48 Stat. 1283 was to give railroad employees the certainty of a contract obligation and the assurance that their pensions would be paid in full as accrued. *Hearings on S. 3231 Before the Senate Committee on Interstate Commerce,* 73d Cong., 2d Sess. (1934) (Testimony of Herman L. Ekern), *reprinted* in COMMISSION REPORT, Vol. II, Staff Papers, 18. The 1934 Act was held unconstitu-

tional[1]; it was followed by the Railroad Retirement Act of 1935.

After that statute was also invalidated, *Alton R. Co.* v. *Railroad Retirement Board,* 16 F. Supp. 955 (D.D.C. 1936), the railroads and unions reached an agreement on the provision of pensions for railroaders. COMMISSION REPORT, Vol. II, Staff Papers, 25. That agreement became the Railroad Retirement Act of 1937. *See generally Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 574 n.3. (1979) Under the 1937 Act, employment before its effective date, for which there had been no contributions, counted towards pension requirements. Also, the 1937 Act did not require an offset for the receipt of Social Security benefits, so that a retiree could receive his full benefits from both programs. COMMISSION REPORT, at 58.

In 1951, Congress made two major changes by Pub. L. No. 82-234 (1951). First, it initiated an offset for any benefits which derived from credit given by both Railroad Retirement and Social Security for pre-1937 work for which the railroad employee could not have made contributions to either system. Before the 1974 Act, this was the only time that Congress eliminated a portion of a Railroad Retirement benefit which had previously been granted. Second, Congress initiated the "financial inter-

---

[1] This Court held the 1934 Act to be unconstitutional not, as the National Railway Labor Conference ("NRLC") urges in its *Amicus* brief, at 8, 38, because it awarded pensions to persons who left the railroads before retirement, but, rather, because it forced the railroads to pay pensions to people for periods prior to the establishment of the fund, during which, of course, those people made no contributions. *Railroad Retirement Board* v. *Alton Railroad Company,* 295 U.S. 330, 349-50 (1935); *see Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 574 n.3 (1979).

change" between Social Security and Railroad Retirement. This required the Social Security Administration to make payments to the Railroad Retirement Board for the amount of benefits Social Security would have paid to railroad beneficiaries had they been covered by Social Security. Conversely, it required the Railroad Retirement Board to pay to Social Security an amount equal to the contributions Social Security would have collected had then-active railroad employees been obligated to contribute to Social Security. The purpose of the financial interchange was "to insure that the social security system would neither gain nor lose from the existence of a separate railroad retirement system," and to fund higher railroad benefits. COMMISSION REPORT, 62.

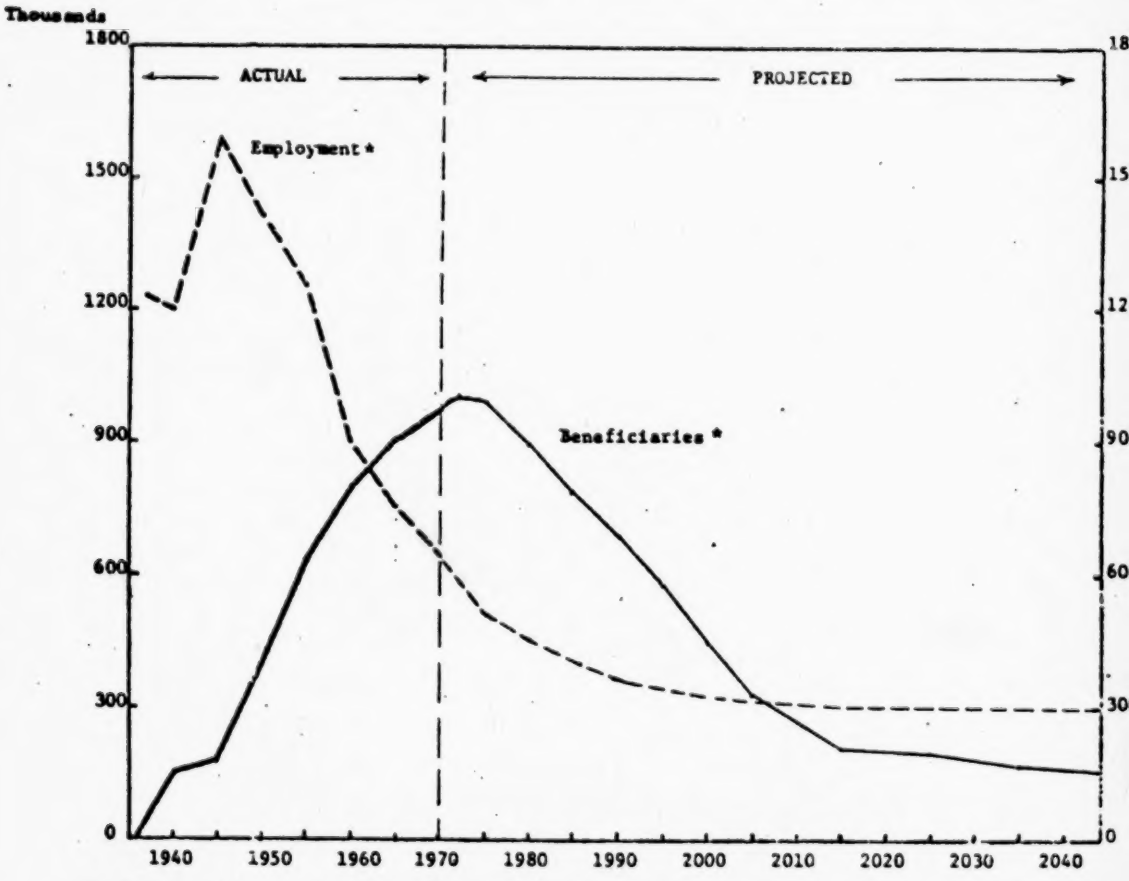
The 1951 "offset" deduction from railroad benefits was not received well by those railroaders whose pensions were thereby affected. In 1954, Congress repealed it, retroactive to 1951. Pub. L. No. 83-398 (1954). Among the reasons Congress gave for the repeal were several that are as applicable to the instant situation as to the previous one: railroad employees believed that benefits, once given, would not be withdrawn; it was inequitable to deny benefits to the many former railroaders who had been compelled to seek Social Security-covered employment by the loss of their railroad jobs; and the offset discriminated against a special group of former railroaders. *Report of House Committee on Interstate and Foreign Commerce,* H.R. Doc. No. 758, 83d Cong., 1st Sess., 6-9 (1953).

II. THE SPECIFIC DEVELOPMENT OF THE 1974 RAILROAD RETIREMENT ACT

Despite net payments of $5.9 billion by Social Security to the Railroad Retirement Fund via the financial inter-

change, it became apparent in the late 1960's that the Railroad Retirement system was underfunded. The actuarial deficiency was chiefly explained by the historic decline in railroad employment. When the Railroad Retirement fund was created in 1937, the railroad industry employed 1,280,000 people. By the first quarter of 1972, however, railroad employment had declined over 50% to 582,000 workers. COMMISSION REPORT, 10. Indeed, railroad employment is expected to continue to decline into the near future. *Id.* This historic decline in railroad employment contradicts the unwarranted assumption suggested by the Government and the NRLC that the Plaintiff Class deserted the railroads to take advantage of employment elsewhere. As a general rule, the Plaintiff Class did not leave the industry of their own will, but were forced, by changes in the industry, to look elsewhere.

At the same time that railroad employment was declining, persons who were active employees during the early years began to retire, thus increasing the number of beneficiaries. Today there are more persons receiving Railroad Retirement benefits than there are contributing to the Railroad Retirement fund. *Id.*, 12. The trend in employment and beneficiaries is shown by the following graph.



*Employment: average of 12 monthly figures; beneficiaries in current payment status on 12/31
Source: Actual data from Railroad Retirement Board, projected data from CRR compute
model.

COMMISSION REPORT, 13.

In 1970, Congress, concerned about the actuarial deficiency, established the Railroad Retirement Commission (hereinafter "Commission") to study the Railroad Retirement system and to recommend methods of making the fund actuarially sound. Pub. L. No. 91-377, 84 Stat. 791 (1970). To ensure an impartial and fully respected study, Congress directed that the Commission be composed of five members with only one railroad manage-

ment representative, and one railroad union representative; the other three were representatives of the public. *Id.,* §7(a) (1). The President of the United States appointed three of the members, the Speaker of the U. S. House of Representatives one, and the President Pro-Tem of the U.S. Senate one.

After an exhaustive study, the Commission submitted its report to Congress on June 30, 1972. One of its four principal recommendations was that *all* individuals fully vested in both Railroad Retirement and Social Security prior to the date of changeover to a new Railroad Retirement system have those dual benefit rights fully preserved.

> "2. Legally vested rights of railroad workers and railroad retirement beneficiaries to benefits based on social-security-covered non-railroad service should be guaranteed, but future accrual of these dual benefits should be stopped." COMMISSION REPORT, at 4 (1972) (emphasis in original). *See also id.,* at 368.

In the extensive elaborations upon this recommendation contained in the body of the COMMISSION REPORT, the Commission repeatedly emphasized that dual benefits should be phased out, but made it equally clear that entitlement to dual benefits should be fully protected for retirees already receiving them and for those like Plaintiff's Class whose rights had already vested. The Commission's final determination was thus the protection of all vested rights, regardless of other indices of employment. *E.g.,* COMMISSION REPORT, 21, 156, 344, 369.

Following receipt of the Commission's extensive and thorough report, Congress then directed railroad management and labor to negotiate and prepare a bill to restructure the Railroad Retirement system to make it

actuarially sound. Pub. L. No. 93-69 §108, 87 Stat. 162 (1973). Congress did not call upon the railroad industry to enhance existing retirement benefits, and it explicitly directed the negotiators to "take into account the specific recommendations of the Commission on Railroad Retirement." Pub. L. No. 93-69 §107(c) (1), 87 Stat. 162 (1973).

Unfortunately, this time there was no representative of the public appointed to participate in or even monitor the executive sessions between rail management and labor as they worked a negotiated exclusion of the Plaintiff Class in contradiction to the Commission's objectives. Indeed, Congress allowed rail management and labor to make their own appointments of negotiators from their active ranks without the review or consent of Congress. Pub. L. No. 93-69 §107(a), 87 Stat. 162 (1973). These negotiators, known as the Joint Labor-Management Negotiating Committee (hereinafter referred to as the "JLMC"), thus included no representative of the public and no direct representative of those ex-railroaders, the Plaintiff Class, whose vested rights were ultimately to be emasculated. The members of the Plaintiff Class simply had no voice in the negotiation process other than that of the railway labor members of the JLMC whose interests turned out to be antithetical to the Class.

Anticipating Congress' directive, the negotiators first met on October 24, 1972, at which time C. L. Dennis (the labor member of the Commission), on behalf of the railway labor unions, issued an opening statement on labor's position, emphasizing strong support for retention of all earned dual benefits of past and present railroaders, including, of course, those of the Plaintiff Class. He reacknowledged that this was one of the four principal recommendations of the Commission. *Deposition of Hollis G. Duensing, Custodian of Records, American Asso-*

ciation of Railroads, January 11, 1979 (hereinafter "*Duensing Deposition*"), Exhibit F. Also, he urged the adoption of a simple pension formula which all prospective pensioners could understand and use to compute their own annuities without the aid of expert actuaries. Underlining the importance of the Commission's recommendation to retain existing earned dual benefits, he noted as well the equitable basis for not treating those who had previously served in the railroad industry any differently than those who were now in that industry:

> "The Human Factor involves the hundreds of thousands of [former railroad] employees who have been *laid off-furloughed-dismissed* or *separated* from the industry, many in their 50's and 60's with 20 to 40 years of service in the railroad industry to their credit. All of these people had planned on a Railroad Retirement Pension under the Railroad Act. . . ." *Duensing Deposition,* Exhibit F. (emphasis in original) (bracketed material added here and in all following quotes for clarity of understanding).

As later events demonstrate, however, the only principal Commission recommendation *not* followed by the JLMC was that which protected the rights of all vested dual beneficiaries, including the Plaintiff Class.

The starting point for the negotiators was a fund deficit at the beginning of 1974 which was estimated at nine percent of taxable payroll. S. Rep. No. 93-1163, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News, 5702, 5703. Recognizing the Commission's specific recommendation and labor's announced position, the JLMC management negotiators initially agreed to protect all "vested rights," which included those of the Plain-

tiff Class. *Deposition of William L. Burner, Jr., Custodian of Records, National Railway Labor Conference, January 11, 1979* (hereinafter *"Burner Deposition"*) Exhibit E. *Duensing Deposition, Exhibit O; Burner Deposition,* Exhibit I. But contrary to the direction of Congress, the labor negotiators, through C. L. Dennis, the former labor member of the Commission, commenced demanding increases in certain of the existing benefits, despite the fund's already recognized actuarial deficiency. These increases[2] amounted to an additional three percent deficit in the retirement fund, a funding condition precisely contrary to the purpose of the negotiations.

The JLMC resolved the original nine percent deficit, which had been the cause of congressional alarm in the first place, through the restructuring of the benefit formula and the receipt of funds from Social Security (later the general fund). *Burner Deposition,* Exhibit J (letter of April 10, 1974 to Sen. Williams from JLMC, at 9); *see also* 120 Cong. Rec. 18391 (daily ed. June 10, 1974).

Additionally, the JLMC resolved the newly proposed add-on three precent deficit suggested by the labor members as the cost for increased benefits. This new three percent was funded by an explicit JLMC decision to disavow the Commission's recommendation that all vested beneficiaries have their rights protected. The JLMC specifically and intentionally decided to eliminate the dual

---

[2] The demanded increases were the following: (1) full regular and supplemental annuity benefits at age 60 to those retiring with 30 years of service, 45 U.S.C. §§231a(a)(1)(ii), 231a(b)(1)(i); (2) full spousal benefits at age 60 for spouses of employees with 30 years of service, 45 U.S.C.. §231a(c)(1)(i)(B); (3) and an increase in benefits guaranteed for widows and other survivors from 110 per cent of comparable social security benefits to 130 per cent, 45 U.S.C. §231c(g).

benefits of the Plaintiff class,[3] that is, those former railroaders who had left the railroads—and interestingly enough, the unions. Thus a *quid pro quo* was worked; higher benefits demanded by the unions were made possible by eliminating the vested rights of the Plaintiff Class who no longer had an active voice in union affairs. As Mr. Dennis stated during the critical JLMC negotiations:

> "Mr. Dennis [at the JLMC meeting, after the proposed elimination of the vested rights of the Plaintiff Class had been presented]: . . . keep the current law in effect with certain changes which come to about 3%, but savings to the plan come to a lot more on the deficit picture. The dual benefits and other things would save a lot more than the new benefits

---

[3] The District Court defined the Plaintiff Class as follows:

"2. Fritz is the duly certified class representative plaintiff in this cause of action of a class of persons who have all the following attributes:

(a) Its members did not have a current connection with the railroad industry as of December 31, 1974, nor did such members work for the railroad industry in calendar year 1974;

(b) Its members had less than 25 years but more than 10 years of credited railroad service as of December 31, 1974;

(c) Its members were not receiving Railroad Retirement benefits as of December 31, 1974;

(d) Its members filed applications for Railroad Retirement annuities after December 31, 1974;

(e) Its members were entitled to the receipt of such annuities beginning on or before January 31, 1977;

(f) Its members have been determined to be entitled to Railroad Retirement annuities and Social Security benefits but not to a so-called 'windfall' amount as computed under Section 3(h) of the Railroad Retirement Act of 1974." 45 U.S.C. §231b(h), Jurisdictional Statement, at 2a.

would cost." *Burner Deposition,* Exhibit I (March 19, 1974 JLMC meeting).

Later the Senate Report on the Act unwittingly confirmed the apparent trade off:

> "It should be noted that these reductions in future payments are offset in part by three liberalizations in benefits designed to make fully effective the early retirement provision which was enacted last year. The three liberalizations which the bill would provide have a level cost of 3.1 percent of taxable payroll. . . ." S. Rep. No. 93-1163, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Ad. News, at 5705. See also *infra* at 36-37, 39.

At no time were affected former railroaders (Plaintiff Class) notified that their dual benefits would be eliminated. Indeed, even as the JLMC was subverting the Commission's recommendation and eliminating the Plaintiff Class' vested rights, it was simultaneously stating in a number of publications that the proposed legislation would not harm anyone's entitlement to his or her vested dual benefits:

> "The [Railroad Retirement Study] Commission and the unions agree completely that the pension changeover will be completed '*without taking away any present benefits from current beneficiaries, or any legally vested benefits from the present workers.*'
>
> "The clear principle is: everybody benefits, nobody gets hurt. . . .
>
> "Q. What about dual benefits?
>
> "A. The Commission recommended that everyone who presently has vested rights to dual benefits (10 years under Railroad Retirement and necessary credits under Social Security) will get them on retirement, just as at present, and that those who are

not vested will not be able to acquire dual benefits. Railway Labor will attempt to expand on this to protect everyone's interest in dual benefits. *Duensing Deposition,* Exhibit C, (*United For Pension Reform: Railway Labor's Major Struggle To Improve Railroad Retirement In 1973,* at p. 3, col. 1, and p. 7, col. 1.) (emphasis in original).

. . .

"*Phasing-out of Dual Benefits*—a key section [of the 1974 Act] would gradually phase-out dual benefits which now permit retirees to receive both a social security and a railroad retirement pension. However, all who presently receive such benefits and workers who qualify for them prior to January 1, 1975, will not be affected and will continue to receive such benefits. *Duensing Deposition,* Exhibit C, (*Legislative, Negotiating Campaigns Ahead,* Railway Clerk, July 1974 Blueprint for Pension Progress, at p. 1 para. 5).

. . .

"It would do so by gradual phase-out of the 'dual' benefits now payable to many railroaders under both the Railroad Retirement and Social Security system; by revisions in the formula for computing future benefits; by a shift of the cost of 'dual' benefits during the phase-out period to Social Security, and by a number of other changes. This would be accomplished by protective arrangements which guarantee higher benefits for those retiring in the next three years, and no loss in benefits for anyone retiring in the next eight years." *Duensing Deposition,* Exhibit C (R. Porter, *Your Washington Reporter,* Railroad Yard Master, May, 1974).

There is no evidence to indicate that the Railroad Retirement Board or its field offices informed any member of the class about the potential reduction in earned benefits during the time that Congress was working on the 1974 Act. Even when members of the Plaintiff Class

asked, they were not warned that they could take steps to preserve their earned dual benefits by early retirement before the effective date of the Act. *E.g., Affidavit of Harry D. Boyd,* filed as part of the class members' Sworn Answers to Interrogatories on December 22, 1978.

On April 10, 1974, the JLMC presented its proposed bill to the congressional sponsors, Senator Williams and Congressman Staggers. *Duensing Deposition,* Exhibit Q; *see also* 120 Cong. Rec. 18391. At the same time, the JLMC distributed a news release, which again disguised the disenfranchisement of the Plaintiff Class:

> "A principal recommendation of the joint rail-union group relates to dual benefits. The Commission on Railroad Retirement recommended that these benefits be phased out gradually in order to protect existing employees and beneficiaries. The joint rail-union group agreed in general with this recommendation." *Duensing Deposition,* Exhibit Q.

Later, in the congressional hearings on the JLMC's draft bill, members of the JLMC were less than candid with Congress when questioned on the adverse effects, if any, their proposed bill might have upon present or future retirees. See *infra* at 31-35.

After the legislative hearings, the Railroad Retirement Act of 1974 was passed on September 30, 1974, without change from the draft bill insofar as it affected Plaintiff's Class. At no time during the hearings did Congress even imply an understanding that it was eliminating a vested benefit of the Plaintiff Class. The bill was then sent to President Ford. On October 12, 1974, President Ford vetoed it, commenting on the failure of Congress to provide an understandable formula for computing one's retirement pension. 120 Cong. Rec. H10546 (Oct. 15, 1974).

That veto was overridden, and the bill became law on October 16, 1974.

Under the Act as drafted by the JLMC and thereafter passed by Congress, full dual benefits were awarded in a manner so as to protect all previously vested present and future beneficiaries except for those former or so-called inactive railroaders comprising the Plaintiff Class. The Plaintiff Class was intentionally eliminated by the JLMC by structuring a special, new formula for vesting which "hit" or "eliminated" only the Plaintiff Class among all railroaders who had made their required retirement contributions and had served 10 years on the railroads by the effective date of the Act, and who had completed ten years of service under Social Security as of December 31, 1974. This was done by additionally, and for the first time, requiring that such vesteds also have (i) performed railroad service at some time during calender 1974, or (ii) have a current connection with the railroad industry as of December 31, 1974, or upon retirement, or (iii) have completed 25 years of railroad service as of December 31, 1974. Thun, the Plaintiff Class who had served the required 10 years was excluded from the dual benefits and treated differently than its similarly situated vested annuitants by the JLMC-added "timing" requirements that the beneficiary have a current connection with the industry in 1974 (or the date of retirement), or have worked for the railroad at some time in calendar 1974.

Immediately after the Act passed, the Railroad Retirement Board distributed a news release which pointed out the increased retirement benefits but camouflaged the loss the members of the Plaintiff Class had suffered. In fact, the release states that all persons vested before the ef-

fective date would have their previously earned dual benefits protected:

> "*Dual Railroad Retirement-Social Security Benefits*
> "One of the most important changes made in the railroad retirement system effects the gradual phase-out of dual benefits. Under the previous law an annuitant could receive separate railroad retirement and social security benefits on the basis of his respective earnings under the two systems.
> "However, employees who retired before the changeover date of January 1, 1975, will still continue to receive at least the same amounts of railroad retirement and social security benefits they were receiving before changeover. Also, *employees retiring after changeover who were fully vested for both railroad retirement and social security benefits before the changeover will receive an additional amount in the tier II portion of their annuity, generally referred to as a 'windfall' amount.*" (Document 23 to Defendant's Response To Plaintiff's Request For Admissions, filed February 9, 1979) (emphasis added).

It was only sometime after the passage of the Act that various Plaintiff Class members, upon inquiry at different field offices of the Board, learned the truth — that they had lost a substantial part of their previously vested dual retirement benefits.

From the beginning of the Commission's investigation, it was evident that dual benefits were a factor in the fund's actuarial problems. But at the same time the Commission recognized the inequity of ignoring vested rights. And early on, even the JLMC paid lip service to that principle, in view of the significant reliance which many individuals had placed on the receipt of dual benefits.

> "Mr. Dempsey: . . . The [dual] benefit is one that if we were starting out we would not have at all. So theoretically we would urge that it be out completely

> as of January 1, 1975. *But we cannot do that — we have people who are relying on benefits, not responsible for them but merely working for them under the rules as they stood.*" *Burner Deposition,* Exhibit I (March 18, 1974, JLMC meeting) (emphasis added).

Despite this announced position, the JLMC, as mentioned above, thereafter ignored the principle precisely so that they could provide higher benefits to others. The existing actuarial problems of the Fund were resolved by various methods, including the elimination of prospective dual-benefit rights. Thus, the classification of the Plaintiff Class was an intentional effort to treat them differently than other vested beneficiaries. The JLMC undertook that effort, and, to further it, put out misleading and inaccurate press releases, capped with misleading colloquies with the congressional committees during the hearing procees. The net result was a statute which listed as its principal purposes the inclusion of the Plaintiff Class for vesting purposes but which thereafter followed by specific and very complex language the carefully reasoned approach of the Commission in virtually every way — *except* in its payment of higher benefits to some and its refutation of the vested rights of the Plaintiff Class as a consequence.[4]

---

[4] This 1974 refutation of vested rights in the railroad system is especially ironic in light of the almost simultaneous passage of the Employee Retirement Income Security Act ("ERISA"), which became law only one month before the passage of the Act, on September 2, 1974. One of the principal purposes of ERISA was to require minimum vesting conditions in private pension plans *e.g., Winer* v. *Edison Brothers Stores Pension Plan,* 593 F.2d 307, 310-311 (8th Cir. 1979) (and the legislative history cited therein). Minimum vesting was accomplished so that, in most instances, ten years of service would fully vest a worker for coverage. 29 U.S.C. §1053. As this Court recently noted: "One of Congress'

SUMMARY OF ARGUMENT

For the special discrimination against the Plaintiff Class to survive this Court's scrutiny, that discrimination must rationally relate to the objects of the Act. The starting point of this Court's analysis is the actual statutory class created and not an atypical example within such class. Here, the Plaintiff Class is a class of persons, otherwise vested under both railroad retirement and Social Security, which was specifically singled out, as a class, for disparate treatment. Because they were selected as a specific group to be sacrificed, the Plaintiff Class is not merely an unfortunate, but justified, anomaly. It was, rather, specifically created by the Act. Therefore, discrimination against its members must rationally be related to the goals of the Act.

The declared, actual goals of the Act were to reduce the railroad retirement fund's actuarial deficiency and to guarantee the rights of those persons vested under the previous law. Neither of these goals was served by the discrimination vested upon the Plaintiff Class.

---

[4] (Continued)
central purposes in enacting this complex legislation [ERISA] was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman* v. *Pension Benefit Guaranty Corporation*, ... U.S. ....., 48 U.S. L.W. 4524, 4528 (May 13, 1980) (footnotes omitted). Ironically, the original intent of providing a railroad retirement annuity was to ensure that railroaders would not be subject to the vagaries, inconsistencies, and unreliability of the private pension system. See *supra*, at 2. With the passage of ERISA, however, all other members of private industry have received basic protection of their pension rights through minimum vesting standards. Yet those railroaders, comprising the Plaintiff Class, now have had vested rights repudiated as a result of the 1974 Act.

The fiscal goal of the Act was not related to the discrimination against the Plaintiff Class because, first of all, the financial problems of the fund were resolved by other revisions, not necessitating the sacrifice of the Plaintiff Class. The need to eliminate the Plaintiff Class only became necessary when the JLMC agreed to increase the benefits to others. Were it not for the increased benefits inserted into the Act by the JLMC, no loss of anyone's vested benefits would have been needed. Secondly, and of equal importance, even if some higher adjustments were arguably permissible, which they are not, the discrimination against the Plaintiff Class was irrational, because the distinction made between the Plaintiff Class and those other persons similarly situated but who did not lose their vested benefits was based solely upon *when* a person performed his railroad service (timing of service) and not the *length* of that service or some other possibly rational criteria. A person's fortunate or unfortunate work with the railroad industry on an arbitrarily selected date, especially a date after he has performed his required length of service and has performed all required vesting criteria, has no rational relationship to the fiscal objectives of the Act. The Government's and the JLMC's attempts to justify the discrimination as based on so-called "career" service or loyalty to the industry are nonsensical since the Plaintiff Class and those persons protected are in all respects the same except for *when* they had performed their required railroad service.

The discrimination against the Plaintiff Class was, of course, antithetical to the Commission's purpose and Congress' purpose of protecting all vested beneficiaries. The JLMC-prepared bill, depriving the Plaintiff Class

of their benefits, passed congressional scrutiny only because the testimony of the JLMC representatives misled Congress as to the adverse effects the Act had on the Plaintiff Class.

Then too, the reliance of the Plaintiff Class on the anticipated receipt of their dual benefits and the severe impact of the loss of these benefits upon the Class' standard of living and their plans for retirement, emphasized the arbitrary nature of this denial of equal protection.

The discrimination against the Plaintiff Class is also unconstitutional because that discrimination constitutes the unwitting congressional sanctioning of the railroad labor unions' breach of their fiduciary duty to the Plaintiff Class. Although labor unions otherwise would have no duty to the Plaintiff Class since the Plaintiff Class' members are no longer affiliated with the unions, the unions assumed such a duty by undertaking to represent the Plaintiff Class' interest in their negotiations with railroad management over the drafting of the Act. As the evidence revealed, the labor unions explicitly permitted the Plaintiff Class to be sacrificed in exchange for higher benefits for its membership. The union was, however, unauthorized to trade off the vested benefits of the Plaintiff Class. The Congress' unwitting authorization of the union's breach of their duty to the Plaintiff Class also rendered the Act unconstitutional.

Finally, the Government's argument that even if the Plaintiff Class has been denied equal protection, the relief accorded in the District Court was improper, is asserted too late and is without merit. The complaint is untimely because it was not raised at any time over the three-year course of this case's progress through the Dis-

trict Court nor was it raised in the Government's Jurisdictional Statement. This belated complaint is also without merit because the purpose of the Act was to protect *all* vested beneficiaries. The Government, now essentially conceding the weakness of the case on the merits, inappropriately seeks to have this Court rewrite the Act so as to thwart that Congressional purpose.

ARGUMENT

I. THE ELIMINATION OF VESTED BENEFITS TO THE PLAINTIFF CLASS REPRESENTS INVIDIOUS DISCRIMINATION IN VIOLATION OF THE GUARANTEES OF EQUAL PROTECTION

A. Under the rational basis test, the classificatory scheme must rationally further a legitimate governmental interest.

The Plaintiff Class does not allege, nor did the District Court conclude, that either a suspect class or a fundamental right is involved in this case; instead, the issue confronting this Court is whether the Plaintiff Class has been denied equal protection pursuant to the "rational basis test."[5] This Court has defined that standard as follows:

> "[A]n individual's right to equal protection of the laws does not deny the power to treat different classes of persons in different ways; it denies the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated

[5] Since an Act of Congress is at issue, plaintiffs assert their rights under the Fifth Amendment's due process clause. While that Amendment does not have an explicit equal protection provision, that guarantee is implicit within the due process clause. *E.g., Richardson* v. *Belcher,* 404 U.S. 78, 81 (1971); *Schneider* v. *Rusk,* 377 U.S. 163, 168 (1964).

alike." *Johnson* v. *Robinson,* 415 U.S. 361, 374-75 (1974) (citations and quotes omitted).

Moreover, a statute's objectives are those objectives announced by Congress, not those invented retroactively:

> "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 648 n.16 (1975). *Accord, Califano* v. *Goldfarb,* 430 U.S. 199, 212-13 (1977).

Although the rational basis standard is the less rigid standard of constitutional scrutiny, it is not a "toothless one." *Mathews* v. *Lucas,* 427 U.S. 495, 510 (1976); *Califano* v. *Aznavorian,* 439 U.S. 170, 175 (1978). Thus, even though this court has held that Railroad Retirement benefits are noncontractual, *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 575 (1979), any discriminatory treatment of one class of recipients in favor of another can only be effected with due regard to the precepts of equal protection.

The Plaintiff Class here seeks the now-deprived benefits not because their needs may be greater than those who were protected, but rather because the members of the Plaintiff Class paid their contributions into the railroad retirement system just as did the protected railroaders. In addition, the Plaintiff Class met and performed all requirements of law for the vesting of these benefits during 10-25 years tenure on the roads. Railroad benefits must not therefore be arbitrarily redistributed from the Plaintiff Class to those receiving higher benefits without a sufficient and proper justification. *Weinberger* v. *Wiesenfeld,* 420 U.S. at 647 (1975).

B. The classificatory scheme explicitly established a class whose members, alone among beneficiaries vested on the Act's effective date, are denied dual benefits.

The starting point of equal protection analysis is the actual statutory classification. *Califano* v. *Boles,* 443 U.S. 282, 293-94 (1979); *Califano* v. *Jobst,* 434 U.S. 47, 50 (1977). This Court has held that equal protection review of a statutory discrimination must be judged by reference to the classification actually adopted and not by atypical examples within the broad legislative classes. *Califano* v. *Boles,* 443 U.S. 282, 294 (1979); *Califano* v. *Jobst,* 434 U.S. 47, 55 (1977).

The Plaintiff Class is a class of Railroad Retirement beneficiaries specifically denied entitlement to dual benefits by the Railroad Retirement Act of 1974. 45 U.S.C. §231b(h)(1). They are not atypical members of any statutorily created class, but are, rather, a distinct class created by the statute. The history of the creation of this class, as well as the language of the Railroad Retirement Act, demonstrates the statutory recognition of the Plaintiff Class as a separate and specific class of Railroad Retirement beneficiaries.

Until the JLMC presented its draft bill to Congress, the Plaintiff Class members were considered no different than other non-retired, vested railroaders. The Commission saw no distinction between the Plaintiff Class and those protected; it explicitly recommended that although dual benefits should be phased out, rights vested by the effective date should continue to be recognized. COMMISSION REPORT, at 4, 368. Lest there be any confusion, the Commission carefully defined the concept of "vesting":

> "*Legally vested.* As used in the text of this report, legally vested benefits refers to the status of currently or fully insured railroad workers under social security as of the transition or changeover date to a new two-tier railroad retirement system, with respect to their entitlement to a guaranty of their OASDI dual benefits accrued before the date of changeover.
> "*Vested benefit.* A benefit the payment of which is not contingent upon a participant's continuation in specified employment;
> "*Vesting.* The attainment by a participant of a benefit right attributable to employer contributions, not contingent upon the participant's continuation in specified employment. In the RR system an employee is fully vested when he obtains 120 creditable service months." COMMISSION REPORT, 552, 555.[6]

Thus, the Commission viewed both the Plaintiff Class and those protected as "vested" because both had sufficient service under Railroad Retirement and Social Security to be fully insured, and were fully insured, prior to the effective date of the Act.

Of course, prior to the passage of the 1974 Act, the Government had always viewed the two groups as one class. That perception is demonstrated, for example, by the Railroad Retirement Board's November 30, 1973, memorandum supplying the actuarial information on earned dual benefits requested by railroad management. *Burner Deposition,* Exhibit B. In that memorandum, the Board speaks of only one class of persons with "vested" rights (*i.e.,* 120 months of railroad service plus sufficient

---

[6] As Justice Stewart recently defined it: "[I]n the pension field a benefit is usually said to 'vest' when a pension plan participant has fulfilled all the specified conditions for eligibility, such as age and length of service." *Nachman* v. *Pension Benefit Guaranty Corporation,* 48 U.S. U.S.L.W. at 4533 (dissent).

Social Security service); no importance is there attached nor even any comment made as to an employee's current connection to, or fortuitous employment in calendar year 1974 or at the time of retirement, with the railroad industry. Furthermore, as shown by the rail industry's January 28, 1974, Listing of Essential Elements [For Negotiation], no distinction between the two groups was made by rail management or labor at this early stage of their 1974 "negotiation" meetings. *Burner Deposition,* Exhibit E. Either a railroader was "vested" based on 10-25 years service and his contributions to the retirement fund prior to the effective date of the Act or he was not; no distinction based upon his "present" status with the industry or upon retirement was initially discernible because no such distinction had ever existed.

Toward the conclusion of their negotiations, however, the JLMC created a distinction between the Plaintiff Class and the protected class. The JLMC made that distinction by adding new alternative conditions to the concept of vesting, which had the effect of excluding the Plaintiff Class from that previously established status. Even though all railroad employees had always been considered "vested" if they had paid in their monies and had sufficient qualifying service under both Railroad Retirement (120 months) and Social Security,[7] the JLMC redesigned vesting to accomplish specifically its purpose of eliminating the Plaintiff Class from coverage. Thus, in addition to the standard meanings associated with vesting, the JLMC invented other, unrelated conditions never men-

---

[7] Generally, a person is considered "fully insured" under the Social Security Act upon meeting a ten-year requirement, but it is less in some circumstances. 42 U.S.C. §414(a).

tioned by the Commission whose principal recommendations they were supposedly to implement:

> "b. *Inactive Employees Not Dually Vested on Leaving Railroad Industry.* For an employee who (i) as of *December 31, 1974* has had less than 25 years of railroad service, (ii) does not as of *December 31, 1974 or the date of his retirement* have a current connection with the railroad industry, (iii) does not have railroad industry service *in* 1974, and (iv) at the end of the year in which he last worked for the railroad industry had not had sufficient quarters of coverage to qualify for a Social Security benefit, no dual benefit will be provided." *Burner Deposition,* Exhibit O, JLMC's April 12, 1974, Fundamental Principles, at 7 (emphasis in original).

Finally, the written statement of William Dempsey, chief management JLMC negotiator, which was incorporated into his Congressional testimony only by reference, shows that the Plaintiff Class was singled out, as a specific group, for discriminatory treatment.

> "The second group [the Plaintiff Class] would be comprised of employees, who, after qualifying for benefits under the Railroad Retirement Act, left the railroad industry without having 25 years of railroad service and who do not now have a current connection to the railroad industry. Such employees, the Joint Negotiating Committee believed, have a lesser equitable claim than those who have remained with the railroad industry. Accordingly, under the bill they would not receive a windfall dual benefit, upon retirement unless they also had fully qualified under Social Security by the close of the year in which they left railroad service (although they would be entitled to the lump-sum benefit refund in excess employment taxes paid)." *Hearings on H.R. 15301 Before the House Committee on Interstate and Foreign Commerce,* 93d Cong., 2d Sess. 168-69 (1974).

Of course, Dempsey failed to tell Congress that the protected class of 10-25 year railroaders had failed to "remain" with the railroad industry for any period of time *longer* than the discriminated class. Their time qualification for vesting was 10 years, the same as Plaintiff's Class. Moreover, Dempsey made no explanation of his bald conclusion that the Plaintiff Class had a "lesser equitable" claim — obviously because he could not logically explain such a distinction.

The JLMC thus specifically contradicted the Commission's definition and major recommendation to guarantee all vested rights established by the effective date. By adding the "current connection" and "work-in-1974" rules, the JLMC carved out a distinct class, who, alone among those with vested rights, were disenfranchised. Members of the Plaintiff Class were thus not the unintended victims of an arbitrary line-drawing scheme. *E.g., Weinberger* v. *Salfi,* 422 U.S. 749, 781-85 (1975); *Califano* v. *Aznavorian,* 439 U.S. 170, 174-75 (1978). Rather the Plaintiff Class was specifically selected by the JLMC for this treatment. It is not an atypical group, but a specific class to whom equal protection analysis is singularly appropriate. *Califano* v. *Boles,* 443 U.S. 282, 294 (1979).

C. The expressed purpose of the Commission and of Congress, to protect all vested beneficiaries, was subverted by the JLMC, whose goal was different.

As previously noted, the rationality of a legislative classification must be judged in light of the legislative purpose of that classification. Two independent sets of goals supported the Railroad Retirement Act of 1974, the goals of the Congress and the goals of the JLMC i.e., the leaders of railway management and labor.

Congress' purposes were unquestionably expressed in the Senate and House Reports on the Act. The Senate Report states as follows:

> "Principal Purpose of the Bill
>
> "The bill provides for a complete restructuring of the Railroad Retirement Act of 1937, and will place it on a sound financial basis. . . .
>
> "Persons in receipt of both Railroad Retirement and Social Security benefits as of December 31, 1974, will continue to receive benefits under both systems without any reduction in those benefits. *Persons who already have vested rights under both the Railroad Retirement and Social Security systems will in the future be permitted to receive benefits computed under both systems just as is true under existing law.*" S. Rep. No. 93-1163, 93d Cong., 2d Sess., (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5702 (emphasis added). See also *id.*, at 5710.

The House expressed the *same* purposes with *identical* language. HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, RAILROAD RETIREMENT ACT RESTRUCTURING, H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 2 (1974).

In short, Congress sought: (1) to make the Railroad Retirement Fund actuarially sound and (2) to guarantee the rights of those vested under previous law, which necessarily included those in the Plaintiff Class. These objectives, of course, dovetail precisely with the recommended objectives of the Commission which had intensely studied the matter for two years prior to the appointment of the JLMC. *Supra* at 7, 24-25.

The congressional purpose to protect completely the benefits of all railroaders vested by the effective date of the Act was not, as the NLRC in its amicus brief alleges,

refuted by any intended congressional action. In attempting to show a congressional desire to exclude the Plaintiff Class, the NLRC refers merely to matters drafted by the JLMC, not by Congress.[8] From the legis-

---

[8] The NRLC at 27-28, and the Board at 44, argue that Congress' knowledge of the effects that the Act had upon the Plaintiff Class was obvious from the Act itself. A reading of section 3(h)(1) and (2) proves that conclusion false. Nowhere within those sections does the Act point out that a previously vested class of beneficaries will be divested. Section 3(h) is perhaps the most confusing section of the Act, of which President Ford said the following:

"Furthermore, the provisions of the benefit formula are so complex that they would be extremely difficult to administer and virtually impossible to explain to the persons who are supposed to benefit from it." 120 Cong. Rec. H10546 (Oct. 15, 1974).

President Ford's remarks are here on point. Of course this complexity is also contrary to Labor's goal of arriving at a simple formula for vesting which all can understand. This was emphasized in Labor's opening statement at the start of negotiations on the bill. *Supra* at 9. The Railroad Retirement Board has discussed the Act's complexity in these terms:

"A former Chief Actuary of the Board even commented that the railroad retirement system is so complex that it virtually defies description. The new law which became effective January 1, 1975, increased the complexity. . . ." RAILROAD RETIREMENT BOARD, ANNUAL REPORT 1976, at 57.

Moreover, the complexity is demonstrated by the Board's form letter 701 prepared in March 1975, and routinely sent for months afterwards to those pensioners who retired after the 1974 Act became effective:

"The Board is unable at this time to compute and pay annuity awards for employees or spouses *under the Railroad Retirement Act of 1974.* Provisions of the new law are *extremely complicated,* and *it will take some time before we can implement all of its provisions.* In order to award you some type of benefit, it was necessary to compute your retirement annuity under the provisions

lative history, it is evident that Congress expected the Plaintiff Class, like all vested potential beneficiaries, to be protected. Congress reiterated this comprehension in other parts of its report on the Act as well:

> "But the Commission also was of the view that any plan to eliminate those dual benefits should include protection of the equities of existing beneficiaries and employees with claims upon such benefits. Dual beneficiaries cannot fairly be criticized, since they have merely secured the benefits to which they are entitled under existing law. That is why their equities should be preserved." *RAILROAD RETIREMENT ACT RESTRUCTURING: REPORT OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,* H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 11 (1974).

Not only did Congress desire to protect the dual benefits of all vested beneficiaries, but it was unfortunately led, by the testimony of JLMC members, to believe that it had done so. On this point there can be no equivocation:

> "Mr. Dingell [Congressman, D. Mich.]: Who is going to be adversely affected? Somebody has to get it in the neck on this. Who is going to be that lucky fellow?"
>
> "Mr. Dempsey [William Dempsey, Chairman, National Railroad Labor Conference and Chief Management Negotiator of the bill]: Well, I don't think so really. I think this is the situation in which everybody wins. Let me explain. . .
>
> "Mr. Dingell: Mr. Dempsey, I see some sleight of hand here but I don't see how it is happening. I ap-

---

[8] (Continued)
of the previous law. Your annuity will be reexamined as soon as possible and if you have an additional amount due, you should receive it by September 1, 1975. Any increase due you will be made retroactively, so no benefit will be lost." Railroad Retirement Board Form Letter 701 (3-75) (emphasis added).

plaud it but I would like to understand it. My problem is that you are going to go to a realistic system that is going to cost less but pay more benefits. Now if you have accomplished this, I suggest we should put you in charge of the social security system.

"Mr. Dempsey: Let me go back once again. I recognized that this is very complicated. It took me a long time to understand why a new benefit formula that would produce at least in the near future slightly higher benefits than the old one, could possibly save the fund a significant amount of money.

"Now let me try it again." Restructuring of the Railroad Retirement System: *Hearings on H.R. 15301 Before the House Committee on Interstate and Foreign Commerce,* 93d Cong., 2d Sess. 199, 201 (1974).

* * *

"Mr. Dempsey: . . . This part of the top is the cost of the gradual phaseout of dual benefits, that is, *the protection to be accorded to people who are on the rolls now receiving dual benefits and those who are vested under both systems as of January 1, 1975, the idea of the Commission being, and we agree with this, that these individuals had a right to rely upon the law as it existed when they were working. They have made their contributions. They have relied upon the law. They . . . should be protected.* So this is the cost of that social production for this group of dual beneficiaries, and the question, the fundamental question it seems to us is, is that a Federal responsibility or is that cost to be fastened on the railroad industry?" *Restructing on the Railroad Retirement System: Hearings on H.R. 15301 Before the House on Interstate and Foreign Commerce,* 93d Cong., 2d Sess., 213-14 (1974) (emphasis supplied).

* * *

"Senator Hathaway: We could cut down the amount of the contribution, changing the cutoff. We could say 11 years instead of 10, as far as vesting is concerned.

"Mr. Dempsey: Yes.

"Senator Hathaway: Or in age in number of years. "Mr. Dempsey: Yes; you can do it both ways. I think the problem here is to find a standard that people in general will regard as fair. You will always have someone who is a little short of the line, and he will always feel that they did something different. Once you depart from what the law prescribes in terms of the qualifying years, of course, then you do have trouble. You can always say that as long as you stick to 10 years for railroad retirement, or however many years for social security, then say to that man, well, we are sorry, but this is really what the law did provide, and if we went any place other than what the law requires, then we would have an argument on where do we stop, or how far should we go. *It seems to me the most logical approach that people will determine is fair is to stick to the vesting requirements of the two respective systems.*

"Senator Hathaway: Thank you very much Mr. Dempsey. We have no further questions." *Restructuring of the Railroad Retirement System, 1974, Hearings Before the Senate Committee on Labor and Public Welfare*, 93d Cong., 2d Sess. 334 (1974) (emphasis supplied).[9]

---

[9] The NRLC has attempted to mitigate the impact of Mr. Dempsey's obvious misstatements to Congress by characterizing his comments as "generalized statements" or a "generalized discussion of key issues" regarding the matter of dual benefits. NRLC Brief, at 29. These statements were not general; they were specific responses to questions which should have caused Mr. Dempsey to disclose the effect that the legislation would have upon the Plaintiff Class rather than cover-up such an effect. The questions which were asked by Congress clearly told Mr. Dempsey that Congress understood that *no one* would lose a vested benefit by the proposed legislation. No fair reading of these matters can lead to any other conclusion. Mr. Dempsey failed to seize any of several opportunities to make either a candid or correcting disclosure to the Congress with regard to the elimination

As if the above deception were not enough, the hearing testimony additionally reveals that Mr. Dempsey flatly stated in testimony before the Committee that the Plaintiff Class was unequivocally covered:

> "Mr. Skubitz: [R-Kansas] Mr. Dempsey, one other question first. As we increased the social security retirement payment to people that are on retirement and in turn raised the tax in order to take care of the increase, have more funds been taken out of the railroad retirement program?
>
> "Mr. Dempsey: Every social security increase has had a sharply adverse impact on the railroad retirement fund because of the dual benefit problem. It would have no effect, it would be a wash, except for the dual benefit situation.
>
> "Let me now indicate briefly what the bill provides with respect to the dual benefit problem. It provides in substance two things. First of all, the parties agreed with the Commission on Railroad Retirement that the windfall dual benefits were inequitable and should be terminated. *At the same time, the parties agreed with the Commission's recommendations that this would have to be done in a manner that would protect the equities of existing employees.*
>
> "Basically, there are two classes of employees that the Commission believed and the parties believed that are entitled to equitable consideration because they have taken the law as they found it. The first are the beneficiaries on the retirement rolls who are receiving dual benefits under the bill. Those people would con-

---

[9] (Continued)
of the vested benefits of the Plaintiff Class. He did not and he unquestionably misled Congress in this respect. The failure of Congress to understand the divestiture of the Plaintiff Class is, of course, further corroborated by the Senate and House's clear expression of intent to include the Plaintiff Class as evidenced by their written reports on the principal purposes of the Act itself.

tinue to receive dual benefits; however, the windfall part of the dual benefit would be frozen, not subject to future increases.

"The rest of the benefits, of course, would receive normal increases. . .

"Mr. Dempsey: Now then, *the second group of employees that would be protected are those who are not even on the railroad retirement rolls, but who have by January 1971* [*sic*:*1975*] *qualified under both railroad retirement and social security*; that is to say, they have both 10 years of railroad service and however many quarters of social security employment are necessary, given their age, to entitle them upon retirement to a benefit. They, too, upon retirement would receive a dual benefit, but again the windfall [would be frozen]. No one else in the future would qualify for dual benefits. . . ." — *Hearings on H.R. 15301 Before the House Committee on Interstate and Foreign Commerce,* 93d Cong., 2d Sess. 190 (1974) (emphasis added).

At no time in any of the discussions quoted above did the JLMC witnesses specifically refer Congress to that portion of their filed statements which might have revealed the harm to the Plaintiff Class, nor did they even allude to a potential divestiture even though the questions, as noted, revealed an obvious Congressional concern for the protection of all vesteds and an obvious Congressional belief that all such vesteds were being covered.

Congress, accordingly, sought to protect the benefits of all vested beneficiaries, present and future, and was led to believe that it had. Since the Act was drafted by the railroad industry, however, it expresses the desires of

that industry's union and management leaders, the JLMC. The industry's purpose was to divest the Plaintiff Class so that full dual benefits could be preserved for the protected class and certain other benefits could be increased.

The following JLMC colloquy on March 20, 1974, concerning the trade-off by the unions of the Plaintiff Class for full protection of, and increased benefits for, other beneficiaries, is revealing of this intention:

> Mr. Dennis [President Brotherhood of Railway and Airline Clerks]: . . . I think we are close on duals, although there is still a way to go. I personally care less about those who are not vested *and those who left the railroads,* except that some are laid off after fifteen or twenty years of railroad service. . . . So I think I can say, for the sake of unity and moving the problem, the organizations know how they have benefited the Plan; all they ask is a return to keeping the Plan we have, patching it up, making 60/30 meaningful but bringing the spouse and supplemental annuity down (?), and improving the widow benefits. . . .
>
> "Dr. Meyers [Labor's actuary]: . . . I developed this position, you saw its merits, labor has been considering it, and as I understand, labor is saying that they will give up on these people [the Plaintiff Class] if you will give up on those actives and preserve their relative position.
>
> "Mr. Dempsey: Does that mean that part of your modification with respect to inactives is agreeable if your approach as to actives is agreeable to us?
>
> "Mr. Dennis: The agreement will be that we are together on duals if we go on our formula." *Burner Deposition,* Exhibit I (Conference March 20, 1974, Washington, D.C.) (emphasis added).

The JLMC's March 19, 1974, meeting also showed the agreement of the negotiators on the sell-out of the Plaintiff Class:

> "Mr. Dennis: You have a proposal, and so does Dr. Myers. He has a number of papers on it, but I think you understand it: keep the current law in effect with certain changes [increased benefits] which come to about 3%, but savings to the plan come to a lot more on the deficit picture.—The dual benefits and other things would save a lot more than the new benefits would cost." *Burner/Deposition,* Exhibit 1 (March 19, 1974, Washington, D.C.).

Furthermore, Mr. Dempsey stated in the March 18, 1974 JLMC meeting that the Plaintiff Class was the group of vested beneficiaries that the JLMC needed to "hit":

> "Mr. Dempsey: . . . We are trying to hit this group of 160,000 [the Plaintiff Class] or its equivalent." *Burner Deposition,* Exhibit I (March 18, 1974, Washington, D C.)[10]

The Washington Post article on the Plaintiff Class, Howard, *130,000 Lose $2 Billion In RR Benefits,* Washington Post,[11] July 25, 1976, at page 1, col. 3, quoted Mr. Dennis' [JLMC labor member] justification for the elimination of the Plaintiff Class as follows:

---

[10] At the time of the JLMC negotiations, the Plaintiff Class was then believed to include 160,000 persons. *Burner Deposition,* Exhibit I (Washington, D.C. meeting of February 13, 1974).

[11] This article was admitted as evidence, without objection, at the hearing on the cross motions for summary judgment. Dempsey, on behalf of the JLMC, responded in writing to this article and, in doing so, never denied the remarks of Dennis. Letter of Dempsey dated July 30, 1976. *Burner Deposition,* Exhibit S.

> "We were vitally concerned about our members, ... but in order to make the fund solvent, we had to sacrifice somebody. Some group had to go. And we didn't want to knock-off widows.
>
> "We had to make some sacrifices, Dennis said, 'we had to show Congress that we were making a good faith effort to revamp the fund . . .'
>
> * * *
>
> "Dennis said, however, that 'that group we cut were out working for someone else. They weren't railroaders anymore. We didn't really feel we were that responsible to them anymore.'" *Burner Deposition,* Exhibit S.

James Menger, counsel for the Committee on Interstate and Foreign Commerce during hearings on the Railroad Retirement Act of 1974, was quoted in that same article as follows:

> "No one was looking out for the people who were eligible for benefits but had left the unions. . . . They were scattered around the country, they were weak, they were unorganized, and as it turned out, they fared the worst. . .
>
> "It wasn't that Labor didn't care about the inactives, but just that they cared more about the actives. Those [the actives] are the people that can come back to you and say, '*You aren't going to be our union president anymore.*'" *Burner Deposition,* Exhibit S (emphasis added).

The article further discusses the post-legislative reaction of the Senate sponsor of the bill, Sen. William D. Hathaway (D-Maine), as follows:

> "Hathaway said he would look into the possibility of amending the act to provide equal benefits to active and inactive pensioners, scaled according to their years with a railroad. The 1974 justification for dif-

ferent treatment of active and inactive employees was 'admittedly tenuous' he said." *Burner Deposition,* Exhibit S.

The JLMC's cost analysis of its proposal perhaps most graphically shows the trade-off between the Plaintiff Class' vested dual benefit and the increased benefits to others.

> "The recapitulation, based upon data supplied by the Railroad Retirement Board, is as follows: Coupling the existing deficiency of about 9% of taxable payroll, on a level basis, with the additional costs of rectifying the existing inequities respecting widows, spouses, and supplemental benefits [increased benefits], the deficiency would be about 12%. However, the restrictions on dual benefits (about 2.5%) [the loss to the Plaintififf Class], the new formula (about 5%) and the adjustment of the financial interchange respecting phaseout dual benefit costs (about 4%), together with a few other economies relating to other of our recommendations, should put the fund into a situation of long-term balance for the present . . ." *Duensing Deposition,* Exhibit Q (letter to Senator Williams from JLMC dated April 10, 1974).

The higher benefits proposed for some recipients were made available by eliminating the vested status of the Plaintiff Class. The actuarial deficiency estimated at 9% could and should have been resolved without affecting the dual benefits for any of those who were vested.

In short, the Commission had sought an appropriate approach that would have resolved properly this 9 percent deficit problem and Congress believed that it was following that approach: the phase-out of the dual benefit structure with a concurrent recognition of vested rights. The JLMC pretended to take a similar line. In fact, though,

the JLMC drafted the Act to protect the vested rights of active railroaders, while repudiating the vested rights of the Plaintiff Class as the price for increasing other benefits. This was accomplished in a manner which, at best, left Congress and the public uninformed of the true nature of the JLMC's actions; at worst, it appears that the JLMC consciously misled concerned members of Congress who were struggling to comprehend an increasingly complex system.[12]

D. The disenfranchisement of the Plaintiff Class effected by the statutory scheme does not rationally further a legitimate governmental purpose.

There is no dispute that the overriding reason for the restructuring of the Railroad Retirement system was to protect or re-establish its actuarial soundness while preserving "vested" benefits. But the goal of the JLMC was to increase other benefits at the expense of a distinct class of vested beneficiaries. The method thus effected

---

[12] It is not here suggested that the failure of Congress to recognize the effect of section (h) (1) on the Plaintiff Class is itself determinative of the irrationality of the provision. As Justice Stevens has noted, it would be unfortunate if "the constitutionality of legislation should turn on the actual motivation, or the lack thereof, of the legislators who participated in the legislative process." *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 97 (1977) (dissent). But that factor adds to the likelihood that the provision is irrational, for it suggests that "there is no reason to believe that the discrimination is the product of an actual legislative choice." *Id.*, at 98 (dissent) [citations omitted]. The provision challenged here, unlike that in *Weeks*, was unnecessary and served no purpose; unlike the plaintiffs in this case, the plaintiffs in *Weeks* were not similar to the individuals protected by the challenged legislation. Moreover, the *Weeks* plaintiffs, unlike those herein, "had no vested rights. . . ." *Id.*, at 85.

by the statute accomplished the latter effort, not the former. The statute, therefore, effectively established an impermissible goal, and reached that goal by unacceptable means.

It is initially apparent that the provision of increased benefits to others was itself a direct repudiation of the need to reduce the apparent actuarial deficiency of the fund. As the Plaintiff Class has noted, restructuring the system provided a savings of about nine percent which represented the actuarial deficiency of the fund. There was no need to repudiate the established rights of *any* vested beneficiaries, present or future. Only as a result of the JLMC's decision to increase benefits for others was an additional deficiency created. In short, the statute took away benefits from some vested former railroaders in order to provide larger annuities for other beneficiaries.

This goal was not a permissible one in light of the already-existing actuarial problems of the fund. It was not a goal which Congress had originally suggested to the Commission, nor was it a goal that the Commission recommended to Congress, nor was it a goal that Congress presented to the JLMC.[13] If there was a compelling need

---

[13] Both the Government, at 46, and the NRLC, at 30, state that the Commission recommended an increase in survivors benefits. This is incorrect. They point to the COMMISSION REPORT, at 337. This is a misleading citation, and it is not surprising that the Commission's exact words have not been quoted. After a brief discussion, the Commission merely stated that "there are good grounds for according a higher priority to improvements in survivor benefits than in benefits for the retired worker and his spouse." COMMISSION REPORT, at 337. An increase was therefore offered as one possibility but was only viewed as relevant in its relationship to the possibility of according higher benefits to a retired worker and his spouse. Moreover, the Commission makes clear that in

to liberalize and increase the benefit structure for existing beneficiaries—a factor which has not been established—it should have been accomplished by tapping general revenue funds, as Sen. Domenici sought to do in S. 467, *see* 123 Cong. Rec. S1448 (Jan. 26, 1977), or, preferably, by imposing a heavier tax burden. But providing higher benefits by negating the vested rights of some beneficiaries during an actuarial crisis represents the height of irrationality and unfairness. The JLMC initiated goal, as effected by the challenged statute, was itself impermissible.

Of equal importance is the fact that even in the absence of this impermissible effort to raise some of the benefits, the statute does not rationally accomplish the overriding purpose of resolving the fiscal problems. Even if the JLMC legitimately was concerned about protecting the actuarial soundness of the fund, the savings of costs alone "cannot justify an otherwise invidious classification." *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969); *Memorial Hospital* v. *Maricopa* County, 415 U.S. 250, 263 (1974); *Medora* v. *Colautti*, 602 F.2d 1149, 1153 n.9 (3d Cir. 1979); *Silbowitz* v. *Secretary of HEW*, 397 F. Supp.

---

[13] (Continued)
keeping with its main goal of preserving all vested pension rights, "any future benefits increases he accompanied by timely tax increases adequate to finance them" so that "the ratio of reserves to the rate of expenditures not be further impaired." COMMISSION REPORT, at 31. And at 21, the Commission stated that "Reforms to make future rights secure can and must be achieved without abridging any legally-vested present rights, even the right to dual benefits vested up to the date of changeover." Thus, the commission emphasized that *any* benefits increases must come from a comparable increase in the taxes and not from a decrease or trading off of *any* vested rights.

862, 867 (S.D. Fla. 1975), *aff'd* 430 U.S. 924 (1977). And this classificatory scheme, on its face, is invidious.

By the design of the JLMC, the statute facially discriminates against a distinct portion of vested beneficiaries, while other vested beneficiaries, identically situated, maintain their eligibility. This is the essence of an equal protection violation: "A general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons." *Califano* v. *Jobst,* 434 U.S. at 53. "The Equal Protection Clause requires more of a state law than non-discriminating application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi* v. *Yeager,* 384 U.S. 305, 308 (1966). Equal protection "require[s] that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom* v. *Herold,* 383 U.S. 107, 111 (1966) (citation omitted). It is precisely that inability which dooms this classificatory scheme.

Here, to the extent that earned dual benefits might be injurious to the fund, the benefits received by both the protected and divested classes are equally injurious. Likewise, to the extent that equity compels the preservation of the dual benefits for those persons who were vested before January 1, 1975, equity compels that both classes receive those benefits. The two groups cannot be made distinguishable by changing the definition of "vesting" in the manner here done. *Richardson* v. *Belcher,* 404 U.S. 78, 83 (1971). The two groups are, in all material respects, the same. The distinction made between them is artificial. The 1974 Act, to the extent of its arbitrary classification, is therefore unconstitutional.

The Government has finally conceded that the pivotal point of this case is not *length* of service in the railroad industry, but, rather, the *timing* of that service. Government Brief, Question Presented at 2.[14] The Government suggests, however, that the timing of service is nevertheless a relevant factor by which to distinguish between positions of supposedly varying equitable values. Thus, the distinction between vested beneficiaries is now hailed by the Government as a "middle course" representing a legislative desire to protect those whom Congress "believed had the strongest equitable claim to receive [dual] benefits." Government Brief, at 27.

As this brief demonstrates, however, the distinction between vested beneficiaries based on the timing of their service was entirely irrational and represented a wholly inequitable choice. The artificial distinction between these vested beneficiaries was accomplished in section 3(h)(1) through use of the "current connection" and "work-in-1974" conditions. These rules have the effect, which was intentional, of protecting only the vested benefits of "active" railroaders.

---

[14] Originally, in its Jurisdictional Statement, at 2, and also earlier before the District Court, the Government argued that "length of service" was a factor in differentiating between the protected and the divested classes. However, the Plaintiff Class in their Motion to Affirm and in this brief has unequivocally shown that the Plaintiff Class was selected for discriminatory treatment not because of its members' length of service but rather because they were not affiliated with the industry as of December 31, 1974 or when they retired. Unquestionably, both classes have performed the same length of service for vesting (10-25 years). The distinguishable characteristic was the time of such service and not length.

As employed in this instance, the current connection rule requires the railroaders to have worked in the rail industry for at least twelve of the thirty months prior to December 31, 1974, or prior to retirement. Even though the current connection rule in other contexts is not without a history in the railroad retirement scheme, its use in this situation is entirely different.

In the past, the current connection rule was used to "reward" certain railroaders in relation to a new supplemental or other non-basic retirement benefit, or to provide a new benefit to those who became disabled while working for the railroads. Government Brief, at 36-37, NRLC Brief at 10. As the District Court found, however, a current connection had never been used to decide which former railroaders would be denied a previously granted benefit. Nor had it ever been used to ascertain eligibility for the basic railroad retirement benefit. It was intended neither to distinquish between vested beneficiaries nor to determine who would have their vested rights recognized. It is thus inaccurate to state that the history of the current connection rule supports its employment in this context. Indeed, the facts demonstrate that the current connection rule and work-in-1974 rules are entirely inappropriate for defining "career" railroadern which is a suggested post-hoc rationalization for their use.

Of course, a protected beneficiary need not ever have actually had a current connection; rather he need only have worked one day in 1974. This work-in-1974 rule provides an alternative way of protecting already vested benefits.

The Government and the NRLC have emphasized the inequity of the work-in-1974 qualification and its unfair purpose by arguing that it is either irrelevant or redundant and therefore its patent unfairness may be ignored. Indeed, the Government seems unsure as to its significance. While initially claiming that the rule is appropriate and "consistent with the very essence of a grandfather clause," Brief of Government, at 29 n.15, it also suggests that the work-in-1974 rule is irrelevant. *Id.*, at 39 n.23. The NLRC is not so schizophrenic on this point. It contends that the rule essentially is redundant i.e., it sets forth an unnecessary repetition. NLRC Brief, at 23; *Id.*, at 23 n.29. Its theory, and apparently that of the Government's in its "alternative" approach to the issue, is that persons supposedly benefiting by it are also protected by section 3(h)(2)(B)(ii), which guarantees the dual benefits acquired prior to an employee's final railroad service.

In any event, the alleged redundancy does not distract from the specific language which, under any reading, demonstrates that the work-in-1974 provision in section (h)(1) is not, and was not intended to be, redundant to that in (h)(2). The first clause of section (h)(2) explicitly states that that section is *only* applicable to those who have not met any of these conditions of (h)(1). 45 U.S.C. §231b(h)2)(A). Quite obviously then, those who worked in 1974 are explicitly and solely covered by (h)(1), which guarantees them a full dual benefit. They are not covered by (h)(2).[15]

---

[15] In its pretense that the work-in-1974 rule is irrelevant, the NRLC makes one especially jarring statement: "if [a railroader] continued in railroad service through 1974, [he] would have a current connection as of January 1, 1975." NRLC Brief, at 23 n.29. This statement could

Even if one were to assume, for sake of argument, that there was redundancy in using the specific work-in-1974 language in (h)(1), it does not alter one key fact: railroaders who by happenstance returned to the industry for even one day in 1974 have had their vested rights fully protected. Whether that protection is effected specifically by (h)(1) or in general by (h)(2) is completely irrelevant; in either instance, an arbitrary eligibility mechanism is used to validate the benefits of certain railroaders who have no more (and no less) right to these benefits than do those who "failed" to work any one day in 1974.

The work-in-1974 rule is thus a continuing part of the current affiliation requirement that bifurcates the Plaintiff Class from the protected class; at the time the Act was passed, it represented a specific intention to protect those former railroaders recently returned to that industry or about to return. The JLMC wanted to ensure that union members, no matter how recent their re-conversion to the industry and how tenuous their status as "career railroaders," would be fully protected. Thus, they purposely specified by amendment during the negotiation process that just one day's work in 1974 would right the "wrong" of having previously left the railroad industry. This Court was disturbed by the ease with which a former railroader could obtain an annuity under the 1934 Act by "temporarily" returning to the rail-

---

[15] (Continued)
only be correct if the expression "through 1974" means the entire year of 1974; its context, however, implies a reference to only some work in 1974. By the very definition of the phrase, therefore, there could be no current connection on January 1, 1975. The man who worked 6 months or 6 days in 1974 could not have a current connection on January 1, 1975, and it was precisely for this type of individual that the work-in-1974 rule was created.

roads, *Railroad Retirement Board* v. *Alton Railroad Company*, 295 U.S. 330, 349 (1935); it should be no less disturbed by this cynical additional condition, which had the same result and was intended apparently to protect labor leaders' friends who otherwise might not vest under the new current connection requirement.

Interestingly enough, a career railroader, as viewed by Congress in the Act itself, is one who spends his "entire working life in the railroad industry," COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, RAILROAD RETIREMENT ACT RESTRUCTURING, H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 11 (1974), not one who had fortuitious service on a particular day. Here, however, those protected, who are similarly situated to the Plaintiff Class, are distinguishable only by when they served the railroads, not by longer or career service. The Plaintiff Class is in all respects as close or as far from being a career railroader as are those otherwise protected. The new current affiliation rule does not even add one day to the length of service required of a railroader for vesting. Indeed, no restriction is placed on any railroader vested by the Act to keep him from leaving the roads at anytime after the minimum 10 years of service. If he worked one day in 1974 or was currently connected in 1974 he could leave with impunity thereafter and totally disregard all so-called "career" notions, yet he would remain vested. The discrimination cannot therefore be explained in reference to a career affiliation with the industry.

Moreover, by the employment of the new current affiliation rule, railroaders serving one day in 1974 or who were currently connected as of December 31, 1974, can vest and receive full dual benefits even though they may have

spent only one-half the time of a Plaintiff Class member with the railroad industry. For example, undisputed affidavits in the record below show Plaintiff Class members with 24 years 4 months of service, 24 years of service, and 23 years 7 months etc. Affidavits of Class Members filed as Sworn Answers to Interrogatories on December 22, 1978. On the other hand, a railroader under the 1974 Act is entitled to receive his full dual benefits so long as he served 10 years in the railrod industry with one day's service in 1974 or with a current connection with the railroad industry as of December 31, 1974.

There is no logic in the Government claiming that a railroader becomes a "career" railroader by virtue of having 10 years railroad service with one day of that time served in 1974 and thereafter leaving the railroad, while on the other hand, maintaining that one is not a "career" railroader who served 24 years with the railroad industry but who failed to serve any particular day of that 24 years sometime during the year 1974. In this situation, a member of Plaintiff's Class made *more than twice the contributions* to the Railroad Retirement Fund than those 10 year railroaders who were lucky enough to be currently connected as of December 31, 1974 or to have worked one day in 1974 or to be currently connected at the time of retirement. There is neither logic nor equity in that result.

We are mindful that the Government further suggests, after the fact, that "Congress could also reasonably conclude in 1974 that individuals who had a 'current connection' with the industry when Congress considered and passed the legislation or when they later retired, were more likely than others to be career employees . . ." Government Brief at 23. This new assertion fails for several additional reasons. First, Congress made no such

finding, and did not even suggest such a conclusion. Second, no such speculative conclusion would follow from the current connection or work-in-1974 rules since they only require service during 1974 or on a retirement date and not for a career or for any length of time longer than the service required of the Plaintiff Class. Third, even assuming *arguendo* the Government's wrongful assertion as fact, encouraging former railroaders to return to the industry to meet the current connection rule is antithetical to a primary goal of the Act, that is, that of encouraging older workers to retire so that new slots would be opened for younger workers, a goal asserted in both the briefs of the Government at 38, and the NRLC at 37.

Distinguishing between vested beneficiaries on the basis of *when* they worked in the railroad industry, whether it be 1947, 1967, 1973, or 1974, is irrelevant in terms of the overall goals of the Act. The important point, recognized by the Commission and Congress, was that all vested rights should be recognized. No other distinctions could fairly be made. If indeed there was any need to reduce the total amount of dual benefits paid out, then it should have been accomplished equally among all potential recipients of dual benefits, rather than by creating artificial distinctions based on the timing of their work record. *Accord, Dandridge* v. *Williams,* 397 U.S. 471 (1970). *When* they worked for the railroads is a different consideration than *how long* they worked for the railroads. The Commission understood the importance of recognizing the contribution of those who had satisfied the length of service test (i.e., vesting), but no one, save the JLMC with its ulterior motives, had ever suggested that vested rights were now to be conditioned on the timing of that service.

E. The Government should not be allowed to avoid constitutional guarantees of equal protection on the NRLC's wrongful assertion that the Plaintiff Class "deserted" the industry or was "disloyal."

Nor does the JLMC's rationale become more persuasive on the theory that the "inactives" (i.e., those who did not meet the current connection or work-in-1974 tests) had "deserted" the railroad industry. The available evidence suggests that most of the Plaintiff Class left because the declining railroad industry forced them out. Senator Domenici noted this factor: ["F]rom existing records and accounts, the majority of these former exployees had no choice of staying with the railroads. . . . I believe [this] to be [an] important consideration today as we attempt to correct this injustice." 123 Cong. Rec. S1448, *supra*. See also Affidavits of William Kirby and Horace Lindsey, filed Feb. 27, 1979; and Sworn Answers to Interrogatories, filed Dec. 22, 1978.[16] It was not their disloyalty to the railroads which motivated the JLMC determination to sacrifice these individuals, but rather the JLMC members' lack of interest in. or formal responsibility to, former railroaders who were no longer union members. As Dennis expressed it: "I personally

---

[16] The Board suggests that plaintiff provided no evidence in his Motion to Affirm that many workers left the railroads involuntarily. Government Brief, at 30-31. That is inaccurate. In that brief, plaintiff noted, as he does here, that there was evidence that many had been forced out. Motion to Affirm, at 19. Secondly, Plaintiff has noted in this brief, supra, at 5, that the railroad industry has been slowly declining, thereby requiring many individuals to leave who would have stayed on. Indeed, the District Court so found, App. A-26, Findings of Fact #72. Finally, the Board's churlish remarks about Horace Lindsey, Brief for Appellant, at 31 n.17, represent only a self-serving twisting of the meaning of an 'involuntary" cessation of railroad work.

care less about . . . those who left the railroads. . . ." *Burner Deposition,* Exhibit I (March 20, 1974, JLMC conference). It is readily apparent that one day's service in 1974, for example, does not and should not determine "loyalty."

The NRLC wrongly asserts that the facts of *Railroad Retirement Board* v. *Alton Railroad Company,* 295 U.S. 330 (1935), demonstrate the Plaintiff Class' disloyalty to the rail industry. NRLC Brief, at 37-38. Although in 1935 when *Alton* was decided many of those who would have otherwise inequitably benefited from the Railroad Retirement Act of 1934 had "voluntarily" left railroad employment, the same assumption cannot be made in this instance. The Plaintiff Class has placed in the record and described the well-documented historic decline of the railroad industry, and has presented examples of class members forced to leave the industry; the evidence shows that "loyalty" was not a factor in the separation of members of the Plaintiff Class from the railroad industry. In a declining industry which mandated the reduction of the work force from 1,280,000 people to 582,000 people, no one can seriously suggest that the workers who left had any real control as a group over their destiny. It is therefore inappropriate for the NRLC to rely simplistically on the 1935 facts of *Alton* to support their latter day contentions here. The situations are different, and neither the Government nor the NRLC has presented any evidence to show otherwise.

Instead of "disloyalty" as the operative reason for singling out the Plaintiff Class, the efforts of the JLMC suggest, instead, an intention to sacrifice some vested beneficiaries so that others could receive still higher benefits. In that connection, it is absurd to suggest, as does the NRLC, at 31, that the increase in some benefits

should be evaluated separately from the denial of vested benefits to the Plaintiff Class. The two events were interwoven; indeed, it is apparent that the former could not have been possible without the latter. Put another way: the Plaintiff Class, who were not in unions, would not have been sacrificed, and need not have been sacrified, had not the JLMC decided to provide higher benefits to other categories of recipients. The JLMC recognized that one act required the other. *Supra,* at 11, 36-37, 39. The two alterations in the 1974 Act represented opposing sides of the same coin.

F. The JLMC caused Congress unwittingly to single out the Plaintiff Class, which had no opportunity to speak up.

Moreover, the effort was occasioned without any opportunity for the members of the Plaintiff Class to dispute it, and without regard to their established rights. The situation is analogous to that in *U.S. Department of Agriculture* v. *Moreno,* 413 U.S. 528 (1973), where a specified class of otherwise eligible beneficiaries—hippies —was singled out for disparate treatment. That treatment was also effected for an impermissible purpose and was therefore found unconstitutional.

> "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.,* at 534. (Emphasis in original).[17]

---

[17] In a private pension case similar to this case, *Winpisinger* v. *Aurora Corporation of Illinois,* 456 F. Supp. 559 (N.D. Ohio 1978), the plan Trustees sought validation of a plan amendment which effectively cancelled the past service credits of certain beneficiaries with

The same is true here. Again, a class of eligible beneficiaries was deprived of their vested rights because of their disunity, lack of knowledge of the situation, and inability to influence those with power. This lack of knowledge and representation was a significant reason for the classificatory scheme which was ultimately designed. As Sen. Domenici said in sponsoring the effort to right this wrong:

> "The interests and concerns [of those adversely affected] were simply not taken into account in our

---

[17] (Continued)
vested rights. The divested beneficiaries were not union members, while those in the union were not harmed by the amendment. *Id.*, at 563. The court agreed with the intervening Labor Department's contention that the "'distinction' from which the Trustees derive the 'rational basis' for their action which they contend renders it other than 'arbitrary and capricious' is based at the best on assumptions and surmises by the Trustees." *Id.*, at 571 (quoting from Labor Department's brief).

The Trustees argued, as does the Government here, that the actuarial soundness of the fund was threatened by the unfunded liability of the vested pension rights of the class against which they ultimately took action. But the court noted that the evidence showed otherwise. *Id.*, at 572. Furthermore, the court admonished the Trustees that if "drastic action" was necessary, the Trustees should not single out one class for mistreatment: "[I]f the Trustees choose to 'protect the fund' through a forfeiture of past service credits, the forfeiture must fall evenly on all participants in the fund." *Id.*, at 573. *Winpisinger* thus demonstrates the inequity of sacrificing one group — an unrepresented, powerless, non-union group — while leaving the other untouched. If any cuts were necessary, they should be applied equally. (*See also*, *Knauss* v. *Gorman*, 583 F.2d 82, 90-91 (3d Cir. 1978), in which the court found the trustees' evidence regarding the fund's actuarial soundness unconvincing and remanded for additional testimony).

haste to pass the 1974 amendments. . . . Their side of the question was never really considered or represented. . . . We, in Congress, cannot change laws adversely affecting thousands of Americans, and expect their continued faith and support in government. Surely changes in laws are necessary, but we should also be mindful of those overlooked in the process." 123 Cong. Rec. S1448 (daily ed., Jan. 26, 1977).

G. A similar previous deprivation of full dual benefits was found by Congress to be invidiously discriminating.

The inequity of the discrimination in this case is highlighted by Congress' action in repealing its only other effort to eliminate a dual benefit. As was previously noted, in 1951 Congress repudiated the dual benefits of former railroaders whose coverage was based on pre-1937 service, a period for which no contributions had been made to the fund (since it did not exist). Congress later retroactively repealed its prior enactment because of the inequities it produced. Congress' reasoning then is equally applicable to the instant situation:

"Until enactment of the 1951 amendments, the Railroad Retirement Act had been universally regarded as providing annuities and pensions to retired railroad workers for the rest of their lives, except for the months in which they performed compensated service for a railroad or for the person by whom they were last employed prior to retirement. This belief has been shattered by the enactment of the dual benefit provision of this law. This provision should be repealed promptly for the following reasons: . . .

"2. *It creates an inequity to employees compelled to seek social security employment.*

"It should be emphasized that many individuals who have qualified for benefits under both acts have done

so because they have been compelled to seek social security employment and not because they were seeking to qualify for an additional benefit upon retirement. . . .

"6. *It discriminates against a special group of retired employees*

"The dual benefit provision discriminates against a special group of retired railroad employees for the benefit of other beneficiaries under the act. Owing to this provision of the law, the railroad annuity or pension of a retired employee who has some credited prior service (i.e., service before 1937) is reduced if he is also entitled to an old-age benefit under the Social Security Act. No reduction is made in the annuity or pension or a retired railroad employee who does not qualify for an old-age benefit. The funds saved by not paying the higher benefit in the first case mentioned above is used to pay higher benefits to other beneficiaries under the act.

"The distinction made between a railroad annuitant or pensioner who also qualifies for a social security benefit and one who does not qualify for such a benefit is a distinction which is contrary to the spirit of the Railroad Retirement Act." H. Rep. No. 758, 83d Cong., 1st Sess. 6-10 (1953).

The House Committee in 1953 summarized its findings in this manner:

"The dual-benefit provision [of the 1951 amendments] discriminates against a special group of retired railroad employees for the benefit of other beneficiaries under the act. . . . The funds saved by not paying the higher benefit in the first case . . . is [sic] used to pay higher benefits to other beneficiaries under this act. . . . In the opinion of the committee, such discriminations against a special group of retired railroaders are wholly unjustified." H. Rep. No. 758, 83d Cong., 1st Sess. (1953).

Those same arguments exist in this instance. Again, a statute has deprived some vested beneficiaries of rights which had previously been established and upon which they had relied; again, that deprivation has taken place so that other recipients could receive higher benefits; and again, those who have suffered have been singled out as "disloyal" to the railroad industry, when the evidence suggests that most were forced into other occupations.

Indeed, though, the instant situation is much more invidious than that of 1951. At least then the deprived class was losing benefits for years of service during which they made no contributions to the Railroad Retirement fund. *See Scott* v. *Railroad Retirement Board,* 227 F.2d 684, 686 (7th Cir. 1955). Here, however, the Plaintiff Class is being denied railroad benefits for years in which they did make contributions. *Hearings before the Committee on Interstate and Foreign Commerce on H.R. 15301* 93d Cong., 2d Sess., 222-223 (1974); *RAILROAD RETIREMENT BOARD, ANNUAL REPORT* 1973, at 35. The same reasons for righting the wrong of the 1951 effort are thus even stronger and more compelling in this situation.

H. The divestiture of the Class did not come about through mere imperfect line-drawing between classes.

The Government and the NRLC suggest that the present situation represents no more than the usual necessarily imperfect legislative effort at line-drawing, as in *Dandridge, Salfi,* and *Aznavorian.* But this is not a mere line-drawing exercise which might have been accomplished with more finesse, yet still manage to effect a reasonable goal. Rather, these lines were drawn intentionally and explicitly by the JLMC for the purpose of excluding the Plaintiff Class from receipt of dual benefits. In that

sense, it is not just an arbitrary, but inadvertent line-drawing; it is intentional.[18]

Despite their reliance on cases involving "arbitrary" lines, the Board and the NRLC must establish that the line was drawn to exclude the Plaintiff Class on the theory that their "equitable" entitlement to dual benefits was considerably less than that of the protected class. *See, e.g.,* Brief for Government, at 27-29, 34, 38, 51; NRLC Brief, at 33. The Plaintiff Class has demonstrated, however, that this division between vested beneficiaries bears no reasonable relationship to the overall goals of the 1974 Act, especially in light of the simultaneous increases to other beneficiaries. The NRLC attempts to defend this policy in part by claiming that, given the noncontractual nature of railroad annuities, there is no significance to "vesting." NRLC Brief, at 33. But that argument begs the question. It is beyond dispute that the Commission placed substantial reliance upon the meaning of vested, viewing it as providing the "middle ground" which rationally effected the goal of phasing out dual benefits. Moreover, the JLMC itself, in many of its expressions to Congress and between its members, also recognized the significance of vested status as of the effective date of the Act. And, indeed, to a great extent, vesting was recognized as the determinative factor in the guarantee of dual benefits. The sole exception to that general rule carved out the Plaintiff Class to fall on the

---

[18] As Justice Stevens recently wrote in dissent: ". . . this therefore, is not a case in which the need to draw *some* line may justify the otherwise arbitrary character of the particular line which has been drawn. . . . [N]o principled justification for the particular discrimination against the [plaintiffs] has been identified." *Delaware Tribal Business Committee* v. *Weeks,* 430 U.S. 73, 97-98 (1977) (emphasis in original).

"wrong" side of the equities. But the only explanation offered for that discrimination was that "inactives" were somehow mystically less entitled to a recognition of vested benefits than were the "actives." That is not a sufficient explanation, however, for an action which *deprives* individuals of previously guaranteed and vested benefits, regardless of its alleged rationality in defining those who should be entitled to additional, new or supplementary payments.

I. This discrimination does not represent a gradual approach to remedying the problem.

This distinction among vested beneficiaries cannot be rationalized as a gradual approach towards remedying the problem of benefits. See NRLC Brief, at 36. There is, of course, nothing gradual about the devastating impact of the Act upon the Plaintiff Class. Nor would any gradual approach allow for an increase in other benefits at the same time since this would be back-sliding on the attempted removal of the fund deficit.

While a gradual approach may be valid in some other circumstances *e.g., Geduldig* v. *Aiello,* 417 U.S. 484 (1974), it does not provide legislatures with the right to distinguish among retired workers whose relationship to the classification at issue is identical. Were it otherwise, a statute could classify workers or beneficiaries arbitrarily, without regard to their identical status, in order to reduce costs. But, this Court has repeatedly held that the savings of finite resources alone cannot rationalize invidious discrimination. *Supra* at 42-43.

J. There are no equitable considerations which favor the singling out of the Plaintiff Class for divestiture.

The Government's argument is ultimately dependent on establishing that equitable considerations have proper-

ly been served by distinguishing among vested beneficiaries on the basis of rules not previously applicable. In the Government's analysis, this discrimination is no different than distinguishing vested from non-vested beneficiaries. But the deliberations of the Commission, the early pronouncements of the JLMC, and the principal purposes of the Act as reported by Congress recognize that the line between vested and non-vested provides the *only* equitable mechanism with which to phase out dual benefits. The alternative, selected here by the JLMC and drafted into the Act, represents a repudiation of all policies and conditions which have preceded it, and cannot, in any guise, be countenanced as an equitable method. A distinction after the fact among vested beneficiaries, which negates rights already established, provides none of the incentives commonly associated with eligibility conditions and operates only to punish certain individuals for actions long since completed and over which they can exercise no control. It bears none of the insignia commonly associated with eligibility conditions. By contrast, the distinction between vested and non-vested is merely a further recognition of the qualitative change in status effected by having served a given period of time. It continues a recognition with which everyone is familiar and on which they have previously relied.

There was no existing actuarial reason not to have drawn the line between the vested and non-vested. Yet the JLMC, in a cloud of obfuscation and deceit, chose to recognize some vested rights, but not others. The choice was not merely one legitimate possibility among several. It was entirely irrational, and in violation of the logic and consideration previously directed at the issue. The selection of non-union and disorganized former railroad-

ers for discriminatory treatment was not a coincidence. It was deliberate, and it appears to betray the worst instincts of those who made that choice. In light of the purposes and goals of the Railroad Retirement Act of 1974, it was a wholly inequitable and irrational decision, and the classificatory scheme which resulted in the divestment of the excluded class should be invalidated as a violation of the constitutional guarantees of equal protection.

K. The reliance of the Plaintiff Class on the dual benefits emphasizes the 1974 Act's arbitrariness.

This Court has noted in the past that the extent of reliance by an individual on a deprived government benefit bears upon the constitutionality of that deprivation. *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 577 (1972); *Goldberg* v. *Kelly,* 397 U.S. 254, 265 (1970). *See also Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 318 (1976) (Marshall, J., dissenting). The fact of reliance and the severe impact the 1974 changes had upon the loss of vested benefits to the Plaintiff Class which resulted from their reliance, is shown by the class members' affidavits filed and made a part of the record below which were supportive of the Plaintiff Class' Motion for Summary Judgment granted below. *See* Class Members Sworn Answers to Interrogatories filed December 22, 1978. The Government presented no evidence to the contrary of these affidavits.

These sworn answers show that many of the class members had been informed by the Government that they were to receive a specified dollar amount of pension from the railroad in addition to their Social Security benefits which amounted to their full vested dual benefits.

However, upon retirement, and after it was obviously too late to take corrective steps, they were informed that the dual benefits they had been promised were not to be paid in spite of their many years of past contributions. Even the Government admits that the Plaintiff Class as well as the protected class had "anticipated" the receipt of the lost benefits. Government Brief at 10. The JLMC said it best, when they spoke at the Congressional hearings about all those persons who were dually vested as of January 1975 (including the Plaintiff Class):

> "Mr. Dempsey: . . . the idea of the Commission being, and we agree with this, that these individuals had a right to rely upon the law as it existed when they were working. They have made their contributions. *They have relied upon the law.* They . . . should be protected." Hearings on H.R. 15301 Before the House on Interstate and Foreign Commerce, 93d Cong., 2d Sess., 213-14 (1974) (emphasis supplied).

See also the remarks of the labor member of the JLMC, *supra* at 9, made at the start of negotiations on the 1974 draft bill.

Mr. Dempsey's remarks during the negotiations further stress this point:

> "Mr. Dempsey: . . . The [dual] benefit is one that if we were starting out we would not have at all. So theoretically we would urge that it be out completely as of January 1, 1975. *But we cannot do that — we have people who are relying on benefits, not responsible for them but merely working for them under the rules as they stood.*" *Burner Deposition,* Exhibit I (March 18, 1974, JLMC meeting) (emphasis added).

As the undisputed evidence reflects, the Government's and the industry's breach of faith have injured the

Plaintiff Class members causing them to substantially alter their standard of living and their plans for retirement. While the Plaintiff Class' reliance and the importance of their Railroad Retirement benefits do not, of themselves, establish a denial of equal protection, they are factors which further support and lend emphasis to the unconstitutionality of the Act.

II. THE CLASSIFICATION IS ALSO UNCONSTITUTIONAL BECAUSE IT IS THE PRODUCT OF A CONGRESSIONALLY SANCTIONED BREACH OF A FIDUCIARY DUTY

The labor representatives of the JLMC owed the Plaintiff Class a duty of fair representation in the drafting of the Railroad Retirement Act of 1974 even though the Plaintiff Class members were no longer with the railroad industry and were not active in the railway unions. This duty arises from the unions' necessarily assumed role as the Plaintiff Class' representative in the negotiations and the Congressional mandate that the specific recommendations of the Railroad Retirement Commission be taken into account.

In the customary labor-management negotiation context, unions are not generally obligated to represent retired, non-union members in their negotiations with management. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Company,* 404 U.S. 157, 181 n.20 (1971). If the unions undertake to represent retirees, however, it may not sacrifice the retirees to advance the interests of the active union members.

> "This does not mean that when a union bargains for retirees — which nothing in this opinion precludes if the employer agrees — the retirees are without protection. Under established contract prin-

ciples, vested retirement rights may not be altered without the pensioner's consent." *Id.* at 181 n.20.

And, as the Third Circuit has stated:

> "When the Union elects to undertake such bargaining [for the retired employee], the Union's duty of fair representation must apply. . . . But having undertaken on behalf of the Fund, to enforce the employer's obligation to pay royalties, the Union was not then entitled to act in a manner which discriminated against the pensioners." *Nedd* v. *United Mine Workers of America*, 556 F.2d 190, 200 (3d Cir. 1977); *accord Hurd* v. *Hutnik*, 419 F. Supp. 630, 654 (D.N.J. 1976).

Furthermore, the duty owed by railroad unions to represent railroad employees whether or not those employees are union members has long been recognized by this Court.

> "But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority." *Steele* v. *Louisville & Nashville Railroad Company*, 323 U.S. 192, 199 (1944).

This Court in *Steele* likened the railway union's duty of fair representation to the duty owed by a legislature to those over whom it legislates.

> "For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights." *Id.*, at 198; *accord, Hargrove* v. *Brotherhood*

of Locomotive Engineers, 116 F. Supp. 3, 8 (D.D.C. 1953); *Crowell* v. *Palmer,* 134 Conn. 502, 58 A.2d 729, 732 (1948).

In their negotiations with management during early 1974, the union members of the JLMC were thus required to represent fairly those Railroad Retirement beneficiaries, such as the Plaintiff Class, who had no other voice, and not to sacrifice the Plaintiff Class for the benefit of the union's active members.

The unions were also required to represent fairly the Plaintiff Class because of the congressional mandate which created the JLMC. In Pub. L. No. 93-69, Congress gave the JLMC the following instructions:

> "Not later than April 1, 1974, representatives of employees and representatives of carriers, acting through the group designated by them pursuant to subsection (a) shall submit to such committees a report containing their joint recommendations for restructuring the railroad retirement system in a manner which will assure the long-term actuarial soundness of such system *which recommendations shall take into account the specific recommendations of the Commission on Railroad Retirement.*" Pub. L. No. 93-69 §107(c)(2) (July 10, 1973) (emphasis added).

As noted above, the Railroad Retirement Commission recommended that the Plaintiff Class, along with the protected class, retain their earned dual benefits. Pursuant to these congressional instructions, the union and management representatives were thus to take into account the interests of the Plaintiff Class as protected by the Railroad Retirement Commission recommendations.

As previously indicated, the railroad unions "gave up" on the Plaintiff Class in exchange for protection of their

members and for an increase in benefits to other members. The union deserted the Plaintiff Class because union officials had no self-serving reason to consider the rights of the Plaintiff Class. The unions' trade-off of the Plaintiff Class in exchange for the protection and enhancement of the actives' benefits is graphically demonstrated by the JLMC's correspondence with Congress upon the JLMC's submission of its proposed draft bill.

> "The recapitulation, based upon data supplied by the Railroad Retirement Board, is as follows: Coupling the existing deficiency of about 9% of taxable payroll, on a level basis, with the additional costs of rectifying the existing inequities respecting widows, spouses, and supplemental benefits [increased benefits to the protected class], the deficiency would be about 12%. However, the restrictions on dual benefits (about 2.5%), the new formula (about 5%), and the adjustment of the financial interchange respecting phase-out dual benefits costs (about 4%), together with a few other economics relating to other of our recommendations, should put the fund into a situation of long-term balance for the present. . . ." *Duensing Deposition,* Exhibit A (Letter to Senator Willlams from JLMC dated April 10, 1974). Also see infra, at 11-12, 36-37.

The cost of the increase in benefits to the protected class (approximately 3% of taxable payroll) corresponds to the savings the fund realized by depriving the Plaintiff Class of their dual earned benefit (approximately 2.5% of taxable payroll). Without increasing the benefits of others, there was no need to deny the dual benefits to the Plaintiff Class. The union and management used the confiscated benefits to embellish benefits of the protected union members. This was a breach of the unions' duty of fair representation.

> "Where the sum is plainly due, the collective bargaining representative should have no power to waive or compromise the claim of one group of employees in return for a concession supposed to benefit a larger number. Such dickering in vested rights is simply taking money from one group to give to another. Even a legislature has no power thus to redistribute the wealth." Cox, *The Duty Of Fair Representation,* 2 VILL. L. REV. 151, 168 (1957).

Perhaps the breach is most graphically shown in the minutes of the March 20, 1974, JLMC meeting wherein labor, in serving up the Plaintiff Class for legislative execution, cavalierly states to management:

> "Mr. Dennis: I think we are close on duals, although there is still a way to go. *I personally care less* about those who are not vested and *those who left the railroads. . . .*" *Burner Deposition,* Exhibit I (emphasis added).

Of course, Mr. Dennis never informed any member of the Plaintiff Class of his attitude. The Class learned of this rejected attitude of labor only after passage of the Act and the impact of their divestiture became known.

Since the discrimination against the Plaintiff Class was the result of a congressional mandate to the JLMC to prepare a bill which was subsequently adopted by Congress, that bill, the Railroad Retirement Act of 1974, is unconstitutional to the extent of the discrimination, which results from the unions' breach of this duty to the Plaintiff Class.

> "But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect." *Steele*

v. *Louisville & Nashville Railroad Company,* 323 U.S. 192, 208 (1944) (Murphy, J. concurring). See also *id.,* at 198-199.

III. THE GOVERNMENT HAS RAISED AN INAPPROPRIATE ISSUE AS TO RELIEF.

The Government has inappropriately raised a new issue of concern to the Plaintiff Class via a footnote at the end of its brief. Government Brief, at 51-53 n. 33. As this section will demonstrate, that issue should not be considered, and even if it is, defendant's suggestion should be rejected. Because the issue is potentially of great significance to the outcome of this case, the Plaintiff Class will not pretend to denigrate it by placing this discussion in a footnote. The Government's proposal should be rejected, but it cannot be ignored.

This is the first time in the course of this litigation, which lasted for nearly three years in the District Court alone, in which the suggestion has been made that a decision in plaintiff's favor on the merits should result in the nullification of benefits to the protected class rather than in the extension of benefits to the Plaintiff Class. Neither the Government nor the NRLC raised this possibility in their Jurisdictional Statement and supporting briefs. Additionally, the Government specifically has limited this case solely to the substantive issue of whether a denial of equal protection exists. Government Brief, at 2. Cf. *Califano* v. *Westcott,* 443 U.S. 76, 90-91 (1979). With the issue thus limited, it is improper for the government at this late stage, and in this manner, to attempt to deny the Plaintiff Class the relief it was accorded by the District Court.

It has long been recognized that questions not raised below cannot suddenly be brought up on appeal. *Trail-*

mobile Company v. *Whirls,* 331 U.S. 40, 50 (1947). This Court there noted that an issue not cited in the petition for certiorari could not be considered. Yet that is precisely what the Government now asks the Court to do. Since the issue was not properly presented to the Court, and since no "remedial incapacity" prevented the District Court from extending benefits to the excluded class, this Court should not even consider the issue. *Califano* v. *Westcott,* 443 U.S. at 91.

If the Court does consider this issue, it should reject the Government's contention. The Government argues that, if the Plaintiff Class is successful on the merits, the dual benefits of still more, but not all, vested beneficiaries should be stricken. Specifically, the Government suggests that those retired as of the effective date of the Act, and those still working but with at least 25 years of railroad service, should not lose their vested benefits, but those still working and with less than 25 years should lose their vested benefits as have the Plaintiff Class already. Contrary to the Government's implication, Government Brief, at 52 n.33, this proposal does *not* comport with plaintiff's analysis of the statute. Plaintiff has not suggested such a scheme in the past and does not do so now. Obviously, any exclusion of vested beneficiaries from a protected classification would be violative of the expressed principal purposes of the 1974 Act.[19]

---

[19] If the Court were to decide to look at this question of nullifying benefits as an aspect of relief, the only possible or appropriate group for sacrifice would be those whose benefits were liberalized and increased by the Act, steps which, as plaintiff has noted, were directly responsible for the JLMC's decision to repudiate the vested rights of the Plaintiff Class. Such an action would be considerably more equitable than that suggested by the Government, for it would amount to a return to the pre-

In any event, though, *Westcott* counsel's strongly in favor of extension, not nullification. It would certainly not be appropriate to determine that the equities suggest that relief should not only be denied the Plaintiff Class, but also others who were entitled to protection of their vested rights. *Califano* v. *Westcott,* 443 U.S. at 89. Moreover, it is abundantly clear that Congress *did* intend to protect vested rights; thus, invalidation of more vested benefits "would impose hardship on beneficiaries whom Congress plainly meant to protect." *Id.* at 90.

Finally, any doubt as to the Congressional intent is answered by the fact that a severability clause virtually identical to that in the Social Security Act cited in *Westcott,* 443 U.S. at 90 and n.8, exists in the Railroad Retirement Act of 1974. 45 U.S.C. §231s. As in *Westcott,* the severability clause "evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." *Id.* at 90. It would be ironic, indeed, if a specific governmental decision to phase out dual benefits, rather than to eliminate them entirely, were ignored in favor of invalidating still more vested rights. The Com-

---

[19] (Continued)
1974 status quo and would comport with the mandate that the Commission and Congress gave the JLMC *viz.,* that all vested dual benefits would be recognized and the eligibility conditions and benefit levels existing at that time would be unchanged. The Government's suggestion, by contrast, would have the unfair result of validating the 1974 increases at the expense of even more vested dual beneficiaries.

mission and the JLMC wrestled with the problem of how to eliminate dual benefits equitably, and the middle approach was settled upon. This Court should therefore recognize that Congress accepted a general obligation to observe rights previously established. It would be a repudiation of that recognition for this court to eliminate additional vested rights as the "relief" accorded those who have only sought to assert their own vested rights.

The Government's last minute attempt to avoid the recognition of long-established vested rights is inappropriate and should be ignored. Alternatively, the court should recognize that, in this case, as in literally hundreds prior to it, extension of benefits to the excluded class was the appropriate relief and that the District Court properly took that action.

IV. CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

Respectfully submitted,

DANIEL P. BYRON
PHILLIP A. TERRY
McHALE, COOK & WELCH, P.C.
1122 Chamber of Commerce Building
Indianapolis, Indiana 46204

GILL DEFORD
National Senior Citizens Law Center
1636 West 8th Street
Los Angeles, California 90017

Attorneys for Gerhard H. Fritz, on his own behalf and on behalf of all those similarly situated, Appellee.